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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

During the January Term, 1848.

40573
VOLUME XIII.

J. J. ORMOND, REPORTER.

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BY J. J. ORMOND,

In the Clerk's Office of the District Court of the United States for the
Middle District of Alabama.

OFFICERS

OF

THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, CHIEF JUSTICE.

EDWARD S. DARGAN,
WILLIAM P. CHILTON,* } ASSOCIATE JUSTICES.

*Elected to fill the vacancy caused by the resignation of Judge Ormond,
31st December, 1847.

M. A. BALDWIN, ATTORNEY GENERAL.

JAMES B. WALLACE, CLERK.

RULES

ADOPTED BY THE JUDGES OF THE SUPREME COURT,

6TH MARCH, 1848.

1. All transcripts of Records hereafter sent to this Court, shall be on paper of uniform size, according to a sample to be furnished by the Clerk of this Court, with a blank margin at the top, bottom and sides of each page, exactly conforming in width to those marked on the sample.

2. Each transcript shall conform in all respects to the 19th of the Rules, for the Regulation of Practice in the Supreme Court, as found in Clay's Digest, p. 607. The transcripts shall be fastened together on the left side of the page, by ribbon or tape, so that the same may be secure, and every part conveniently read.

3. The transcript shall be written in a fair, legible hand, and each paper or order composing such transcript, shall constitute at least one paragraph.

4. No paper less than the sample furnished shall form a part of such transcript, and the space within the margin shall be filled with writing or printing, leaving appropriate spaces between the paragraphs.

5. No Record which does not conform to these Rules, shall be received and docketed by the Clerk of this Court.

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ADVERTISEMENT.

THE REPORTER was not informed of all the Cases printed in this volume, in which Judges CHILTON and DARGAN did not sit. There are doubtless others than those noted, in which they were employed as counsel while at the Bar, and consequently did not participate.

This volume, like its predecessors, is not free from typographical errors; but as an *errata* is rarely read by any but the curious, and the professional reader will readily understand that the Judges used apt and significant terms, and make the proper correction for himself, we decline publishing one. By way of apology, however, for the Reporter and compositors, and even Judges, if one be necessary, it may be said that the immense amount of business thrown upon the Court, allows the Judges no time to copy their Opinions, and they are often, so far as the manual labor is concerned, written *currente calamo*.

SUPREME COURT:

JANUARY TERM, 1848.

TRIBUTE OF RESPECT TO THE MEMORY OF HON. HENRY GOLDTHWAITE.

J. W. PRYOR, Esq., at the request of the Bar, as expressed therein, presented the following preamble and resolutions, and moved that they be entered on the records of the court. Mr. Pryor preceded his motion with some appropriate remarks. The motion was granted, and the proceedings ordered to be spread on the minutes of the court.

PROCEEDINGS OF THE BAR.

At a meeting of the gentlemen of the Bar attending the Supreme Court, on Wednesday, the 15th of December, 1847, the Hon. JAMES W. McCLUNG, of Madison, was called to the Chair, and LEWIS I. PARSONS, Esq., of Talladega, was appointed Secretary.

On motion of JAMES W. PRYOR, Esq., the following preamble and resolutions were unanimously adopted :

This meeting, moved by a regard for the memory of the Hon. HENRY GOLDTHWAITE, late one of the Associate Justices of the Supreme Court, deem it proper to express in some public manner, their appreciation of his character, and of the services rendered by him to the State. Be it therefore,

Resolved, That his clear, quick, and vigorous intellect, his comprehensive learning, and his purity of character, eminently fitted him for the place he so well filled, and that we entertain a high opinion of the manner in which he discharged his public duties.

Resolved, That whilst we entertain a high admiration for his abilities, and a grateful recollection of his services to the State, we cannot forget the many amiable personal qualities

which adorned his character, and endeared him to all who knew him.

Resolved, that JAMES W. PRYOR, Esq., communicate these proceedings to the Supreme Court, and respectfully ask, in the name of this meeting, that they be entered on the records of the court.

Resolved, That the members of this meeting wear the usual badge of mourning, during the residue of the present term of the Supreme Court.

Resolved, That the Chairman and Secretary communicate these proceedings to the family of the deceased, and assure them of our warm sympathy in the heavy affliction which has befallen them.

The Chief Justice replied as follows :

The present term of this court has commenced under circumstances well calculated to cast a gloom over our feelings. One who has so long shared our labors, assisted and enlightened us by his counsels, has been withdrawn, not only from this scene of toil, but has ceased to occupy a place among men. The melancholy truth that the HON. HENRY GOLDTHWAITE is no more, is continually arresting our thoughts, when the mind is turned to the onerous and responsible duties devolved on us in this chamber. To say of him, that he was an able jurist, would convey a most imperfect idea of his character and his merits. He was not only a profound lawyer, but he was a man of extensive general attainments—distinguished for quickness of perception, the faculty of fixing the attention, bold and vigorous thought, and long continued mental application, combined with unusual amiability and courtesy in his intercourse with the Bar, and associates of the Bench. His conclusions, even upon the gravest questions, were attained almost by intuition. Yet his pride of opinion never triumphed over his love of truth, for he was always prepared to re-examine his first impressions, and do homage to the majesty of principle, or the influence of established precedent. His powers of argumentation, and skill in the management of causes, while at the Bar, were so remarkable as to place him in the front rank of the profession ; and the lustre of his fame, instead of being dimmed by his judicial career, was only made brighter and brighter. Had it been his fortune to occupy a seat in the highest delibera-

tive assembly of the nation, his powers of adaptation would have enabled him to acquire a reputation among the most honored.

Judge GOLDTHWAITE was no ordinary man—by his native intellect, without the advantage of wealth or classical education—prompted by an energy which never faltered, and a perseverance which knew not despair, he attained a position in society, of which the most ambitious might be proud. Thus adding another to the many examples, that while academical and collegiate learning teaches its possessor to acquire knowledge with the greater facility, well directed industry, supported by correct principles, will often gain the highest honors, in despite of the want of early training. The path of honorable distinction is open to all, but he that would tread it successfully, must pay the price of ceaseless application.

Judge G. was a man of strong and ardent feelings, yet from a sense of duty, he had learned to control himself so as rarely to utter a harsh or unkind remark, even of those whom he supposed had injured him. He regarded it as an instinct of the gentleman to restrain the tongue from “evil speaking;” and above all, never to traduce or disparage one who cherished towards him sentiments of unkindness.

The death of our lamented associate is perhaps more painfully felt, not only because we have been intimately associated in labor which knows no intermission, for more than ten years, but from the fact that he was well known to my brother ORMOND in his youth, and became known to me when we applied for admission to the Bar, even before we attained our majority. Upon leaving us at the close of the last term, alluding to his contemplated resignation, he observed, that he should not meet us here. But how little did either of us suppose, that our association was to be dissolved throughout all time. A mysterious and wise Providence has however so ordered it; thus exemplifying, that “all flesh is as grass, and all the glory of man as the flower of grass.” We bow with resignation to the *fiat*, cheered by the hope, that as our brother was a christian, he has but entered on a state of “endless joy.” We direct the resolutions of the Bar to be entered on the minutes of this court, and will unite in the accustomed manifestation of esteem and sorrow

TRIBUTE OF RESPECT TO THE MEMORY OF
THOMAS D. CLARKE, ATTORNEY GENERAL.

The Hon. B. F. PORTER presented the following, and moved the court that the same be inserted on the records of the court, which motion was granted.

Mr. PORTER introduced his motion with remarks pertinent to the subject.

The members of the Bar here assembled, have to deplore the death of THOMAS D. CLARKE, Esq., late Attorney General of the State of Alabama. The connection existing between us, officially and professionally, would render an expression of regret proper, even did our personal relations not require it. But friendship, as well as the courtesy of associates in the same vocation, unite, to demand the tribute usually and justly awarded to the memory of good men and distinguished officers. The youth of Mr. CLARKE, when elevated to the responsible office held by him, would not have authorized the expectation that he could more readily adapt himself to the high contests of it than other gentlemen just entering upon the trials of the Bar. But we must bear testimony to the faithfulness and industry which characterized his efforts to serve the State, and to exhibit in his advocacy of her criminal justice, that firmness and ability which must render the office respectable, and give dignity to its possessor. The qualities of the Attorney General, in these particulars, the respectful conduct observed by him towards us professionally, the kindness of his heart, and urbanity of manners, all require such an expression as is herein made, on the occasion of his death. Therefore,

Resolved, That the members of the bar express the most sincere regret at the decease of their brother and friend THOMAS D. CLARKE, late Attorney General.

Resolved, That we tender to his family and relatives the consolatory reflection, that he has, while suffering a calamity common to us all, left a name distinguished among his contemporaries, and eminently cherished by his friends.

Resolved, That the Supreme Court be requested to permit these proceedings to be entered on the minutes of the court.

To which the Chief Justice replied as follows :

In the death of the late THOMAS D. CLARKE, the State has

lost a valuable public servant. His election to the highly important office of Attorney General first introduced him to this court; and though young in years, he soon furnished evidence that he possessed an acute and discriminating mind, and was no tyro in his profession. He was always willing—yes, felt it an imperative duty, to submit to any amount of labor necessary to enable him properly to represent the interest of the State or his clients. We can now say, with unaffected sincerity, that we do not remember to have received a brief from him which did not judiciously and perspicuously state the points of his case, and when authorities were deemed necessary, they were pertinent and well arranged.

His mind was rather solid than brilliant, not precocious in its developments, but gradually unfolding its powers and capabilities. We were so impressed with this characteristic, as to have remarked his improvement from term to term. But his professional merit was not his highest commendation—he had laid deeply the foundation of a pure morality, which manifested itself not in profession merely, but in his daily intercourse with the world. He was a firm believer in revelation, and during his protracted illness in view of death, was sustained with the assurance of future happiness.

In this bereavement, we mingle our sympathies with the bar, and with them mourn the loss of a valued friend—their resolutions will be entered on the minutes of the court.

TRIBUTE OF RESPECT TO THE MEMORY OF CHANCELLOR CRENSHAW.

The Hon. ABRAM MARTIN presented the following resolutions, and accompanying them with some touching and pertinent observations, moved that they be inserted on the minutes. The motion was granted, and the resolutions ordered to be spread on the minutes.

Resolved, That in the death of Chancellor CRENSHAW, the public service has been deprived of and able an impartial Judge, and the Bar one whose respectful deportment, urbane and kind manners, endeared him to the profession.

Resolved, That the distinguished position of Chancellor CRENSHAW, his age in the performance of judicial functions in Alabama, and his benevolent character as a man, eminent-

ly entitle his memory to the regard of his brethren of our profession.

Resolved, That the Supreme Court now in session, be requested to have the proceedings of this meeting spread upon the minutes of the Court.

Resolved, That a copy of the proceedings of this meeting be transmitted to the family of Judge CRENSHAW.

In answer to the motion of the honorable mover, the Chief Justice spoke as follows :

The late Chancellor CRENSHAW was a man of rare worth; only they who knew him intimately were prepared to appreciate him. Diffident and unpretending in his bearing, it required a familiar and friendly intercourse to make one acquainted with his virtues. In disposition he was artless and unsuspecting—punctiliously honest in all the relations of life—he was confiding almost to a fault.

Chancellor CRENSHAW was the oldest judicial officer in the State—for nearly twenty-six consecutive years, he performed the arduous duties of the Bench. He came to Alabama in the maturity of manhood, bringing with him the reputation of a ripe scholar, and a profound lawyer; and the memorials he has left, indicate that he was a good thinker, an industrious Judge, and a tasteful writer.

He enjoyed the advantage of a collegiate education, and was perhaps the first *alumnus* of the College of South Carolina; and such was his fondness for classical lore, that he not only retained, but continually improved his knowledge of the ancient languages.

He was a man of great purity of character, and endeavored both by the consistency of his life, and the influence of precept, to elevate the standard of morality, by inculcating the important lesson that, “virtue alone is happiness below.”

Chancellor CRENSHAW fell a martyr to severe and unremitting application—literally “died at his post.” His body naturally feeble—worn down with more than three score years of toil, ceased to perform its functions; and in the bosom of his family, where he would have chosen to die, he yielded his immortal spirit with composure and resignation to God, trusting alone in the merits and mercy of Him whom in life he acknowledged. We unite with the Bar in the honors proposed to his memory.

TRIBUTE OF RESPECT TO THE MEMORY OF
HON. REUBEN SAFFOLD.

GEORGE W. GAYLE, Esq., presented to the Court the following preamble and resolutions :

Whereas, during the present year, God in his providence has seen fit to take from amongst us the Hon. REUBEN SAFFOLD, one of the fathers of our profession, whose judicial decisions we read as learned lessons in the law, whose urbanity as a practitioner is worthy of our imitation, whose affections and whose friendships his wife and children and unnumbered friends do all attest, and over whose unexpected death *we* should all weep, and the whole country mourn. Therefore,

Resolved, That in his death a great pillar has been torn from the temple of the law, and we, who seek to follow in his footsteps, bereft of a venerable and venerated patron.

Resolved, That in life the State received the service of his wisdom, and now mourns over his death that she may not be ungrateful.

Resolved, That we tender our heartfelt sympathies to his immediate friends and relatives, asking them to remember in their grief that "the Lord giveth and the Lord taketh away."

Resolved, That a copy of this preamble and these resolutions be forwarded to the family of the deceased, and that G. W. GAYLE, Esq. be instructed to request the court to order them to be entered on its minutes.

Mr. GAYLE accompanied the motion with an appropriate eulogy on the character of the deceased, to which the Chief Justice replied as follows :

The late Hon. REUBEN SAFFOLD removed to the southern part of Alabama about 1813, while it was a part of the Mississippi Territory, and was a member of the Territorial Legislature. He was a delegate to the Convention which formed our State Constitution, and upon the organization of the new government, was elected to the Circuit Court bench, and *ex officio* a Judge of this Court. Upon the establishment of a separate Supreme Court, he was retained as one of its Judges.

Judge SAFFOLD was firm and unyielding when duty required him to act, but he was ever kind and conciliatory. As a friend he was true, and worthy of all confidence. He was

honest and honorable in every situation—always respecting the feelings and interest of others. In the social and domestic virtues, he was a model for imitation.

As a magistrate he was conscientious—cautious, industrious and enlightened, satisfying himself by first consulting all aids within his reach, of the correctness of his conclusion, before he announced his judgment. His opinions command the respect of the Bar and his successors.

Upon returning to the Bar in 1843, more than a half dozen years after the resignation of his seat on the bench, he entered upon the practice of his profession with all the ardor of the youthful aspirant. His intercourse with his professional brethren of every age was most courteous; his success even surpassed his own expectation, and equalled the high reputation he had acquired as a Judge. But in the midst of professional success, and every thing to endear life to him, he has been struck down, not by the slow wasting hand of disease, but by a sudden visitation of Providence, which terminated his career in the fullness of health and in the vigor of manhood. He fell just as he was entering on the autumn of life, with a reputation pure and unsullied. His religious opinions were those inculcated by the Bible, and they who knew him best, believe they were his practical guides.

Alabama has lost some of her brightest jewels, but they have left us the recollection of their virtues, on which memory, when it withdraws from the cares and toils of life, may often repose as an oasis in the surrounding waste. The service which we have this day performed for our honored friends may soon be performed for us. Let it be our pride so to live as to deserve it. We cordially unite with the Bar in honoring the memory of our deceased friends.

REPORTS

OF

CASES ARGUED AND DETERMINED

AT THE

JANUARY TERM, 1848.

McGEHEE, ADM'R, v. HANSELL.

1. Where the record discloses, that a judgment was once rendered in the cause, in favor of the defendant, and another trial is had, and a judgment rendered for the plaintiff, there being no plea of a former recovery, or objection made to the action of the court, the appellate court will presume, that a new trial was granted by the court, or consented to by the parties, and omitted to be entered by mistake.
2. When, in obedience to a *sci. fa.* one appears as administrator *de bonis non*, by his attorney, and proceeds to trial, it will be presumed that he was the representative of the deceased, and was regularly made a party to the suit.
3. An attorney at law, is a competent witness for his client, unless he has an interest in the suit.

Writ of Error to the Circuit Court of Lawrence. Before the Hon. G. W. Lane.

HANSELL brought an action of assumpsit against Valiant, in the circuit court of Lawrence. The defendant appeared,

and pleaded the general issue. At the September term, 1844, the death of the defendant was suggested, and Amos P. Galloway, sheriff, and administrator *ex officio*, was made a party defendant. At the spring term, 1845, he pleaded the insolvency of the estate of Valiant, which was admitted to be true. At the March term, 1846, a trial was had, and a verdict was rendered for the defendant. At the September term, 1846, it appears that the term of office of Galloway having expired, it was suggested to the court, and an order was made, that the suit be revived against the representatives of Valiant when known. At the March term, 1847, a notice was ordered to Henry M. McGehee, sheriff of Lawrence county, as the successor in office of Galloway. This notice was issued, and returned executed. The next entry is in this form: John W. Hansell v. Henry M. McGehee, administrator *de bonis non* of Henry Valiant, deceased. This day came the parties by attorneys, &c. and thereupon came a jury, to wit, &c. who upon their oath say, they find for the plaintiff, and assess his damages at \$1157. Then follows the usual judgment of recovery, but it is further ordered, that said plaintiff have not execution therefor, but the same be certified to the orphans' court of said county, by which said estate is declared insolvent. On the trial, a bill of exceptions was taken, which shows that Mr. Peters, the plaintiff's attorney, was examined by the plaintiff as a witness. The defendant objected to the admissibility of his testimony, for the reason that he was the attorney of the plaintiff. The objection was overruled.

The defendant, McGehee, here assigns for error—1. That it appears that at the March term, 1846, a verdict and judgment was rendered for the defendant, and it does not appear that a new trial was granted, or that this verdict or judgment was set aside.

2. That the court erred in permitting the plaintiff's attorney to testify.

L. P. WALKER, for plaintiff in error.

1. As the verdict rendered in favor of the predecessor of the plaintiff in error, at the March term, 1846, was never set

aside, the subsequent action of the court in the premises, at a subsequent term, was clearly erroneous.

2. Upon principles of public policy, it seems to me to be clear, that the attorney is not a competent witness for his client. He has every temptation to misrepresent the facts. His professional reputation depends upon success, and it often happens that he not only brings the suit, but instigates it—volunteering an opinion where none was asked, and hunting out cases where none were thought to exist. Nor is this general objection at all weakened by the fact, as stated in the bill of exceptions, that the fee of the attorney had been paid. The objection to his competency is not so much upon the ground of a direct pecuniary interest, as of the general public policy, which should exclude him altogether. Still, he had a direct interest: he was entitled, in the event of success, to the tax fee. The recent cases of *Stones v. Byron*, and of *Dunn v. Packwood*, 1 B. C. Rep. 248, 312, are directly in point. These cases are referred to in the *Law Reporter* for July, 1847, p. 136, where the court, Patterson, J. in the one case, and Earle, J. in the other, laid down the doctrine broadly, that a man ought not to be advocate and witness in the same case. An apt illustration of the evil is to be drawn from the trial of Sir Thomas More. See *Lives of the Chancellors*, vol. 1, p. 580. The same principle has been recently decided, without qualification, in New York and Massachusetts. The decisions are not yet reported, but were published in the newspapers of the day.

PETERS, contra.

1. Though it does not appear, in so many words, from the transcript itself, that the judgment of March term, 1846, was set aside, yet this must have been done: or if not done, the plaintiff in error consented to waive it, by afterwards coming into court, reviving the suit in the name of McGehee as administrator, and proceeding to trial and judgment without objection. The court having jurisdiction, this consent waived the irregularity—*consensus tollet errorem*. Broom's Max. 36; *Lucas v. Hitchcock*, 2 Ala. 287; Id. 337; 3 Ala. 552; Id. 581; Id. 632; 1 Ala. 515; 7 Ala. 788.

An attorney is but an agent; and all agents, unless directly

interested in the event of the suit, are competent for either side. Gullett v. Lewis, 3 Stew. 23; Stringfellow, et al. v. Mariott, 1 Ala. 573; 1 Greenl. Ev. 561, § 416, *et seq.*; see Stewart v. Conner, Dec. term, 1848.

The expectancy of the tax-fee does not disqualify: it is but a contingent and uncertain interest. Clay's Dig. 236, 334. Whereas the interest which renders one incompetent as a witness, "must be a present, certain and vested interest, and not an interest uncertain, remote and contingent." 1 Greenl. Ev. 535, *et seq.*, § 390, 391, 392, 393, and cases cited; State v. Truss, 9 Port. R. 126. It is true, an attorney might be said to have an interest in the subject matter of the suit he manages, but this does not render him incompetent as a witness. 5 S. & P. 426; 2 Port. 389; 2 Ala. 314.

DARGAN, J.—It appears that at the March term, 1846, a trial was had in this cause, between the plaintiff, and Galloway, as the administrator of Denton H. Valiant, and a verdict and judgment rendered for the defendant. The next step appears to be a suggestion, that Galloway's term of office as sheriff had expired, and a motion was made for a *sci. fa.* against the representatives of the decedent when known. A *scire facias* issued, and was executed on the plaintiff in error, and the parties appeared by attorney, and went into trial, the result of which was a verdict, and judgment in favor of the plaintiff below. It is to be presumed that a new trial was granted by the court below. The defendant, McGehee, appeared by attorney, and went to trial. We are to presume from this, that he was the administrator *de bonis non* of the deceased, and that he was regularly made a party to the suit, as he made no objection. 3 Ala. R. 581. There was no plea of a former trial filed by him, no objection made that he was improperly brought into court; but there is on file a declaration, and plea, and the parties go to trial without objection. Under such circumstances, this court must presume, that the order for a new trial was omitted to be entered by mistake, or that the parties consented to set aside the verdict on the former trial, and neglected to have it entered on the record. At all events, as there was no plea filed of a former trial, nor objection made in the court below,

that this cause had been previously tried, we cannot reverse the judgment rendered in favor of the plaintiff.

The second assignment of error is also untenable. It is the daily practice to permit attorneys to give evidence, which is usually of some matter arising in the progress of the suit: and the rule is well established, that agents, or attorneys in fact, may be examined on the part of their employers, unless their interest in the suit is made to appear; but that a witness is the agent, or attorney in law, or in fact, of one of the parties, does not disqualify him on the ground of interest.

The judgment is therefore affirmed.

TENISON v. MARTIN.

1. A variance between the cause of action indorsed on the writ, and the declaration, must be total, and amount to a radical departure, to authorize the court to reject the declaration.
2. M. being entitled under the law of congress to a pre-emption on a certain quarter section of the public land, agrees with T. to abandon his claim and permit M. T. to take possession and make improvements, so as to entitle the latter to a pre-emption, and in consideration of an amount agreed to be paid him, does abandon his claim, and proves a pre-emption for M. T.—*Held*, that in an action by M. against T. for the price of his claim, the contract was void and could not be upheld.

Error to the Circuit Court of Cherokee. Before the Hon. G. W. Lane.

ASSUMPSIT by defendant in error, who was plaintiff below, against Tho. Tenison. The declaration, which contains several counts, avers that the plaintiff, on the 30th March, 1843. being in possession of a certain improvement on the southwest fractional quarter of section, No. 36, in township No. 9, in range No. 10, east, &c. and being entitled to a pre-emption right upon the same, under the provisions of the act of con-

gress, passed the first day of June, 1840, at the request of the defendant, relinquished his pre-emption right to the government of the United States, in consideration of which relinquishment, defendant agreed to pay him \$1,000 therefor. The second count avers the promise on part of defendant, to pay one thousand dollars to plaintiff in consideration of the plaintiff's relinquishment of his right of pre-emption to said land to the government, and his valuable improvements made thereon to one Matthew Tenison, the brother of the defendant, and permit him, the said Matthew, to enter upon and improve said land, that he might enter the same under the act of congress of 4th September, 1841—avers a compliance on part of plaintiff, and that said Matthew Tenison took possession, and entered the land in the land office under the said act of congress. The *third* count is a *quantum valebant*, for the pre-emption right relinquished at defendant's request, by the plaintiff, to the government; the *fourth*, a similar count, in consideration of a relinquishment of plaintiff's pre-emption right to the government, and of his improvement to one Matthew Tenison, and consent that he might enter upon the same and improve it, and finally enter it, under the act of 4th September, 1841. The *fifth* count, without averring the plaintiff's right to a pre-emption on the land, declares defendant's indebtedness in consideration of plaintiff's surrender to Matthew Tenison, at defendant's request, of improvements made on the land by plaintiff, and of his consent that Matthew T. might enter the same under the act of 1841. The declaration contains several other special counts, stating the consideration for the promise on part of defendant variously—such as “the abandonment by plaintiff of his possession, so that Matthew Tenison might improve and enter the land;” “that plaintiff would not assert his right to pre-emption,” &c. To each of the counts (twelve in number) a demurrer was interposed, which being overruled by the court, the defendant below pleaded the general issue, with leave to give any matter in evidence which might be specially pleaded.

The proof, which was demurred to, was in substance this: The said quarter section of land had been occupied by Samuel Martin from the year 1833 to 1839 or 1840, when he de-

parted this life, leaving several children. The plaintiff below was the son of said Samuel, and was himself a man of family, and resided on the land. That he agreed with defendant to waive his right to a pre-emption on the land, by becoming a witness to prove the pre-emption of Matthew Tenison, who, by the contract, was to take possession and make improvements, so as to entitle him to a pre-emption under the act of congress of 1841. The proof further showed that plaintiff below did become a witness to prove the pre-emption for M. Tenison, which, by the rules of the land office, amounted to a waiver of his claim; and after the entry was made, plaintiff, in a conversation with Thomas Tenison, the defendant, stated that he had agreed to take \$650 for his claim, but to avoid difficulty, he would take \$600. Tenison refused to pay this sum, but stated he had offered a certain amount in money and a certain amount to be secured by note due at Christmas then next, but that he did not then consider that he owed the plaintiff any thing. The land was proven to be worth \$1,000, the waiving of the right of pre-emption was shown to have been worth six or seven hundred dollars. There is no proof fixing the exact amount which defendant below was to pay the plaintiff. One witness states, that defendant acknowledged the contract to be that he was to pay one hundred dollars down, and more if he could, and was to give his notes for the remainder due at Christmas, but that he added at the same time (having then made the entry) that he did not consider *then* that he owed the plaintiff any thing. The plaintiff joined in the demurrer to the testimony, which demurrer was overruled, and the damage being uncertain, it was ordered that the jury assess the same, who returned as their verdict that they assessed the damage at the sum of \$826 71, whereupon, the court gave judgment for this sum. It also appears by a bill of exceptions taken at the trial, that defendant below moved the court, before demurring to the declaration, to strike out each count in the declaration because of a variance between the several counts and the cause of action as indorsed on the writ. The cause of action so indorsed, is, to recover \$1,000, the price agreed to be paid by defendant below, in consideration that the plaintiff would abandon his pre-emption right on the S. W. quarter of Sec.

36, T. 9, R. 10, and permit Matthew Tenison to improve it, and entitle himself to a pre-emption thereon.

The motion to strike out was overruled, and the plaintiff in error now assigns for error—

1. The overruling his motion to strike out the counts.
2. The overruling the separate demurrers to each count in the declaration.
3. The overruling the demurrer to the testimony.
4. The court erred in rendering final judgment upon the verdict of the jury, who do not appear to have been sworn to assess the damages, &c.

SAMUEL F. RICE, for plaintiff in error, made the following points:

1. Any agreement opposed to public policy, the provisions of a statute or of an act of congress, is void, and cannot be made the ground of a recovery.

2. A promise by the purchaser of public land, (or by a third person,) to pay for improvements made thereon previous to the purchase, will not support an action. Nor will a promise made to a settler on public land, in consideration of his waiving his right of pre-emption thereon, be enforced. *Duncan v. Hall*, 9 Ala. Rep, 128; *Kirksey v. Kirksey*, 8 Ala. R. 131; *Cromelin v. Minter, et al.* 9 Ala. R. 594; *Hudson and Hudson v. Milner*, 12 Ala. 667.

3. An agreement entered into on Sunday, is void: and so is an agreement for the sale of any interest in land, if not reduced to writing.

4. If the sale of a right of pre-emption is valid, and an action is brought to recover on a verbal promise made in consideration of such sale, the seller cannot recover without proving that he had a right of pre-emption; and in such case, if the counts are special, the proof must show the contract to be such as is set forth in those counts.

5. Even against a party demurring to evidence, it will not be intended, in the absence of all proof, that a plaintiff has proved matters, which the law has made pre-requisites to his right to recover. *Woodward v. Harbin*, 4 Ala. R. 534.

6. The effect of a joinder in a demurrer to evidence, is to discharge the jury from the further consideration of the issue

submitted in the first instance to them. And in such a case, it is erroneous to leave it to that jury to assess the damages for the plaintiff, unless the record shows that a writ of inquiry was awarded, and that the jury were sworn to assess the damages. *Hall v. Browder's adm'r*, 4 Howard's (Miss.) R. 224.

L. E. PARSONS, contra.

The proof shows that Martin, by agreement with defendant, abandoned the possession of the S. W. fractional quarter Sec. 36, T. 9, R. 10, and that defendant's brother went into possession, and entered the land in his own name. 1. Is this a sufficient consideration for the promise to pay? 2. Is there any legal prohibition of the agreement, or any thing in the policy of the law which forbids it?

1. Is this a sufficient consideration? This court has held that an agreement to lease the reservation allowed to an Indian under the treaty of Fort Jackson, is a valuable consideration and will support a conveyance; yet the court acknowledge, the moment the reservee abandons the possession, the land becomes the property of the United States, and decide the case upon that state of facts. But they sustain the transaction. *James v. Scott*, 9 Ala. 579.

In what does that case differ from the one at bar? The reservee had no interest which he could convey, neither had Martin. But the Indian let James into possession, and that was held sufficient. So did Martin let Matthew Tenison into possession. This, then, must be sufficient in this case, if the same rule is recognised, unless there is something in the policy of the law which forbids such a transaction as this. It will be borne in mind that he (Tenison) has acquired a title.

2. Does the policy of the law forbid it? The facts show that M. Tenison has entered the land. By reference to the acts of congress, it will be seen that no person can enter lands as a pre-emptioner, unless he is a citizen of the United States, twenty-one years of age, has resided four months previous to the first January, 1840, on the land, and is the head of a family.

This court will presume that this proof was all made when he made the entry in the land office; because the register

and receiver constitute a court for the purpose of deciding all these questions—and their action will not be inquired into in a collateral proceeding.

Matthew Tenison, then, must have been one of that class of persons, which was to be benefited by the operation of the pre-emption laws, or he could not have entered the land in his own name. The only restriction upon the settler is contained in the act of June 22, 1838, which prescribes an oath that he shall take before claiming the benefits of this law.

This oath, it will be seen, only prevents him from entering for another directly or indirectly, &c. &c.

There is nothing in the acts of congress which forbids the party who is in possession to leave it generally, without consideration, or with the purpose of letting another of the same class of persons enter, who will be able to assert a pre-emption in his own name, when he is in possession. Act June 1, 1840—June 22, 1838—May 29, 1830—June 19, 1834—Jan. 23, 1832.

It has been the practice to recognize these transfers by the general land office, and even the assignment of the certificate of entry. The instructions of the department gave the form for the assignment; and this court recognized them. 2 Por. 148, and *Falkner v. Jones and Leith*, 12 Ala. 165.

If this were an attempt to convey a right of pre-emption, so that one might enter who never could be permitted to enter lands, by reason of his not possessing the requisite qualifications, there would be some degree of foundation for the argument. But that is not this case.

Martin merely abandoned the possession. He did not undertake to convey any thing to Tenison. The latter made his entry on his own qualifications alone.

Upon the question of consideration see 9 Ala. 579; 1 Sug. Vend. 6 Am. ed. p. 10; Eng. ed. 142, note; also top page 148, note 1; also 104, § 14.

The court will presume the jury were sworn in support of the record, especially as the parties were in court, and made no objection.

CHILTON, J.—In *ex parte* Ryan, 9 Ala. R. 90, it is said, the act of 1807, (Clay's Dig. 321, § 50,) which directs the

courts in which any cause is depending, "at any time to permit either of the parties to amend any defect in the process, or pleadings, upon such conditions as the said courts, respectively, shall in their discretion, and by their rules, prescribe," being a beneficial enactment and promotive of the remedy, should be liberally expounded, and that the authority thus generally conferred is not to be limited to cases where there is something by which to amend apparent on the record. It is not permitted that the plaintiff should declare for a cause of action entirely variant from that indorsed on the writ. In such case, the court on motion would reject the declaration. *Wharton v. Franks*, 9 Por. Rep. 232; *Sexton v. Rone*, 7 Ala. Rep. 829. But to justify this, the departure must be total, and amount to a radical variance. If there be any variance in the case at bar between the indorsement and counts, it is of such character as might be amended, but we think, each count is sufficiently indicated by the indorsement, and that the court very properly overruled the motion to reject them.

2. The demurrers to the declaration and the proof, involve the same inquiry, to wit, whether, under the allegations and proof, the action of the plaintiff below can be sustained. By the act of congress of the 29th May, 1830, granting pre-emption rights to settlers on the public lands, it is provided "that all assignments and transfers of the right of pre-emption given by this act, prior to the issuance of patents, shall be null and void." See U. S. Stat. at Large, vol. 4, p. 421, § 3. By an act passed the 23d January, 1832, supplementary to the above, it was provided that persons who had purchased under the act of 1830 might assign and transfer their certificates of purchase or final receipts, and that patents might issue to the person to whom the same might be transferred. The act of May, 1830, which seems to be the basis of the general legislation of congress upon the subject of pre-emptions, was revived, without material alteration, by the subsequent acts of 14th July, 1832, and 19th June, 1834, but by the act of 22d June, 1838, a new regulation is introduced, by which the person making the entry, or claiming the benefit of the act, before he was entitled to a patent, after complying with the provisions of the act, was required to make

an oath before some person authorized to administer the same, which oath, with the certificate of the person administering it, shall be filed with the register of the proper land office, when the land is applied for, and by him sent to the office of the commissioner of public lands, "that he entered upon the land which he claims in his own right, and exclusively for his own use and benefit, and that he has not directly or indirectly made any contract or agreement in any way or manner, with any person or persons whatever, by which the title which he might acquire from the United States, should inure to the use or benefit of any one except himself, or to convey or transfer the title to said land which he might acquire to any other person or persons whatever, at any subsequent time." It is further provided, "that if such person, claiming the benefit of this law as aforesaid, shall swear falsely, he shall be subject to all the pains and penalties for perjury, forfeit the money which he may have paid for the land, and any grant or conveyance which he may have made in pursuance of such agreement or contract, as aforesaid, shall be void, except in the hands of a purchaser in good faith, for a valuable consideration, without notice. See Stat. at Large, 5 vol. 251. The subsequent act, passed June 1, 1840, continues in force the act of 1836, "with the same exceptions, whether general or special, and subject to all the limitations and conditions, contained in said act, and subject also to some explanatory provisions declared in the act of 1840. Ib. 382. The act under which the plaintiff in error entered the land, passed September 4, 1841, (Stat. at Large, vol. 5, 456, § 12 and 13) declares "all assignments and transfers of the right thereby secured before the issuance of the patent null and void," and prescribes an oath, containing, with additional provisions, the substance of the affidavit required by the act of 1838. I have been thus particular in referring to all the enactments bearing upon this case, in order to ascertain whether the contract, disclosed by the proof and stated in the declaration, can be sustained. That contract simplified, amounts to this: the defendant in error, having as a bounty from the government, a right to enter a tract of land worth \$1,000, at the price of \$200, in consideration of a stipulated compensation, agrees to waive that right in favor

of another, and agrees further to become a witness to prove his vendee's right to enter, thereby estopping himself from afterwards claiming the land. The objects of the national legislature in the enactment of pre-emption laws, doubtless were to compensate the pioneer for his privations attendant upon his early settlement in a new country, in tendering him a permanent home at an under value, by which means also the country becomes settled, and the sale of the public lands is facilitated. It is further evident by the whole scope of legislation upon this subject, that congress designed, as far as possible, to discourage speculation in this description of titles. Persons are not allowed to avail themselves twice of the benefit of the act. They must not own 320 acres of land in any state or territory of the United States, nor shall they be entitled to this right if their settlement and improvement were made, that they might sell the land on speculation. See act of 4th Sept. 1841; Stat. at Large, vol. 5, 456.

These considerations are persuasive to show the design of the acts, and as indicating the objects to be accomplished by the restrictions imposed upon transfers. If the plaintiff in error had purchased the right which the defendant claimed under his improvement and occupancy, under an agreement that the latter should make the entry in his *own name, but for the use and benefit of plaintiff*, it would not be contended for a moment that such contract could be upheld. It would come within the very letter of the inhibition contained in the oath required. Shall he be permitted to do indirectly, what the law prohibits him from doing directly? He may avail himself of the munificence of the government in procuring him a home, but he is not allowed to speculate on its bounty. Were such true, he might enter as often as he improved and settled a place. He might not make the entry in his own name, but which is equivalent, he shares all the profits of an entry which, as a matter of form, another makes instead of himself. The case of the Ex'rs of Hudson v. Milner, decided by this court at the last term, is so analagous in principle to this case, that I must confess I can perceive no material difference. In that case, Milner having obtained \$100 from Hudson, agreed if he did not refund it by the time the land office was opened for entries, or Hud-

son should desire to make his entry upon a quarter section upon which both he and Milner were entitled to pre-emption, then Milner was not to assert his claim, and Hudson was to pay him whatever sum over and above the \$100 which the neighbors should say was just. Hudson made the entry, and Milner sought to recover what had been adjudged by their neighbors to be a just compensation. The court say, "this is evidently a contract for the sale of the pre-emption. The mode the parties adopted to carry it into execution, is wholly unimportant." It is insisted by defendant's counsel that it is the practice of the government, and which has been recognized by this court in *McElyea v. Hayter*, 2 Porter's R. 148, to regard the transfers of certificates of pre-emption entries as obligatory. This has been permitted by virtue of the act of 23d January, 1832, authorizing assignments of entries made under the act of 1830, and the revival of the latter act was construed as reviving the enabling act of 23d January, 1832. But no case has been found, and we apprehend none exists, where assignments or sales of pre-emption rights *before the entry was made* in the land office, has been upheld. In the case of *McElyea v. Hayter*, the court held, that an authority to make title when the patent should issue to lands entered under the pre-emption act of 1830, was void, as it was a circuitous mode of evading the act of Congress. *James v. Scott*, 9 Ala. Rep. 579, relied upon by the counsel for the defendant in error, is unlike the present case. That was a lease during the life of the reservee of his reservation under the treaty of Fort Jackson. By the terms of the treaty, a sale of the land worked a forfeiture of it to the government, but the court, waiving the question as to whether the reservee might well make the lease, held, that as the lessee had taken and held the undisturbed possession of the land, he could not treat the contract as a nullity by which he acquired it. In the transaction, no principle of public policy was contravened; besides, it was not an action to enforce a contract forbidden by law. We think therefore that the contract set up by the plaintiff, as the same is shown to exist by the proof, cannot be supported. This is doubtless a hard case upon the defendant in error, but it is our duty to declare the law, and not to compromit its settled provisions

by adapting our decisions to the exigencies of particular cases. What we have said is decisive of the case, and it is unnecessary to examine the other points argued at the bar.

Let the judgment be reversed and the cause remanded.

LAMAR v. MINTER.

1. A patent for land issued to Sheppard S. Johnson, and a deed for the same land, was made by Spencer S. Johnson—Held, that it was admissible to prove, that the patentee was known when the patent issued, as Sheppard Spencer Johnson, and that the two names were intended to indicate the same person.
2. A conveyance by deed, of “the south part of the east half of the north east quarter of section 27, township 16, and range 12, containing 40 10-100 acres,” is not a conveyance of the south half of the half quarter section, without reference to quantity, but is a conveyance of the number of acres mentioned, of the south half of the half quarter section. This construction cannot be controlled by the patent for the same land, which describes it as containing 80 20-100 acres, nor is parol evidence admissible to show that the entire south half of the half quarter was intended to be conveyed, though chancery, in a proper case might reform the deed.
3. The declaration of one owning land on the opposite side of a line, insisted on as the proper boundary, is not admissible to prove the boundary, it not being shown that his testimony could not be obtained.
4. Under the act of 1836, “for the relief of tenants in possession against dormant titles,” to entitle the tenant to compensation for permanent and valuable improvements, it is sufficient that his occupancy was *bona fide*, under color of title. And for the purpose of showing that his occupancy was adverse, he may prove by parol, that it was the intention of the plaintiff to sell, and of the defendant to purchase, the land in controversy, though by mistake omitted in the deed.

Writ of Error to the Circuit Court of Dallas. Before the Hon. Geo. Goldthwaite.

THIS was an action of trespass at the suit of the defendant in error, brought as well to try titles to the east half of the

north east quarter of section twenty-seven, in township sixteen of range twelve, situated in the county of Dallas, as to recover damages for its occupancy. The defendant by way of plea, suggested his adverse possession under the statute—also that the title of the plaintiff was dormant, that he had made valuable and permanent improvements, &c. He also pleaded a former recovery, and the plea of “not guilty.” The plaintiff demurred to the plea of former recovery, and his demurrer being sustained, the cause was tried on the issues of fact—a verdict returned in favor of the plaintiff for so much of the land sought to be recovered as is embraced within the following boundaries, viz: “commencing at the east end of a line east and west, which divides the east half of said half quarter section into two equal parts running thence, on the eastern boundary of the same, south forty-two feet, thence west to the western boundary line of said half quarter section, thence north on said western boundary line forty-two feet, and thence east to the place of beginning;” and also \$140 damages. Judgment was rendered accordingly.

From a bill of exceptions sealed at the defendant’s instance, it appears—1. That the plaintiff gave in evidence a patent from the United States for the land described in the declaration, dated the 21st January, 1834, to William Johnson and Sheppard S. Johnson, for the east half of the north east quarter of section twenty-seven in township sixteen and range twelve, containing 80 20-100 acres, being the quarter section which embraces the land in controversy. He also offered in the same connection a duly proved deed, by which William Johnson and Spencer S. Johnson conveyed to the plaintiff the land described in the declaration, and then proposed to show that the grantor, Spencer S., was, when the patent issued, known as Sheppard Spencer Johnson, and that the two names were intended to indicate the same person. To all which defendant objected; but his objection was overruled, and the evidence permitted to go to the jury.

2. Previous to the institution of this suit, the plaintiff had recovered, and was in possession of the north half of the quarter section described in the declaration, and the defendant was, when the action was commenced, in possession of

the south half of the same. Defendant introduced a deed duly recorded, by which the plaintiff conveyed to the defendant "the south part of the east half of the north-east quarter of section twenty-seven, in township sixteen, and range twelve, containing forty 10-100 acres;" and then proposed to prove by the plaintiff's declarations, and other parol evidence, that by the "south part," the plaintiff intended to convey the entire south half quarter to the defendant, and that the south half contained forty 10-100 acres. To the admission of the plaintiff's declarations, and other evidence explanatory of his intentions and the effect of the deed, the plaintiff objected, and his objection was sustained.

3. It was shown on the part of the defendant, that some twenty years previous to the trial, a line had been run from east to west across the centre of the section by the county surveyor. The question was, whether this was the true line. To show its correctness, the defendant proved by witnesses who resided on each side of it, that they had recognized it as the true line of division; and then offered to prove that one Murphy, who lived "on the opposite side of the line," said it was correct, though it was not shown that Murphy was dead or out of the jurisdiction of the court. But upon the objection of the plaintiff, the evidence as to Murphy's declarations was excluded.

4. Under the suggestion filed, the defendant offered to prove that he had made valuable and permanent improvements within three years, &c. But this evidence was rejected on the ground that there was no evidence other than the deed and the possession under it, to show that the defendant had had adverse possession.

5. The defendant prayed the court to charge that the words "south part," in the deed from the plaintiff to the defendant, were the same as "south half," and so operated as to convey the entire half of the half quarter section, although it might contain more than forty 10-100 acres.

6. The defendant also prayed the court to charge, that the patent which describes the half quarter section as containing eighty 20-100 acres, in connection with the deed from the plaintiff to the defendant, designating forty 10-100 acres as

the quantity of the "south part," must be construed to indicate the intention to convey a half of the half quarter section, although the half quarter contained more than forty 10-100 acres; which charge was also refused. The several rulings of the circuit court were excepted to, and are now presented for revision.

R. SAFFOLD and G. R. EVANS, for the plaintiff in error, to show that the deed under which the defendant below claimed, conveyed the *south half* of the half quarter section, without reference to quantity, and the parol evidence was admissible, cited 13 Vin. Ab. 79, pl. 24; Jackson v. Barringer, 15 Johns. Rep. 471; Jackson v. Moore, 6 Cow. Rep. 706; Powell v. Clark, 5 Mass. Rep. 355; Jackson v. Loomis, 18 Johns. Rep. 81; 4 Kent's Com. 466; Smith v. Prewit, 2 Marsh. Rep. 158; Smith v. Norvells, 2 Litt. Rep. 159; Waterman v. Johnson, 13 Pick. Rep. 261; Dorsey v. Hammond, 1 H. & Johns. Rep. 201; Davis v. Batty, Id. 264; Thompson v. Brown, Id. 335; Belt v. Miller, 4 Har. & Johns. Rep. 536; Hembree v. White, 2 Overt. Rep. 202; Baker v. Talbott, 6 Monr. Rep. 182; Ralston v. Miller, 3 Rand. Rep. 44; Bass and Carter v. Gilliland's Heirs, 5 Ala. Rep. 761.

The possession of the defendant was adverse, and under the statute he is entitled to be compensated for permanent and valuable improvements made in good faith. Jackson v. Scoonmaker, 2 Johns. Rep. 230; Jackson v. Camp, 1 Cow. Rep. 609; Hollinger v. Smith, 4 Ala. Rep. 367; Tillotson v. Doe ex dem. &c. 5 Ala. Rep. 407; Clay's Dig. 320, § 47; Winslock v. Hardy, 4 Litt. Rep. 274; Vorhees v. White's Heirs, 2 Marsh. Rep. 27.

Where the intention of the parties to a deed can be discovered, the court will give effect to it, if consistent with law. Bridge v. Wellington, 1 Mass. Rep. 119; Wallis v. Wallis, 4 Id. 135; Marshall v. Fisk, 6 Id. 24; Pray v. Peirce, 7 Id. 381; Litchfield v. Cudworth, 15 Pick. Rep. 23.

The declarations of adjacent proprietors of land are admissible in a controversy between other persons upon a question of boundary. Jackson v. Hubble, 1 Cow. Rep. 613.

To show that it was not admissible to prove by parol testimony that Sheppard S. and Spencer S. Johnson were in-

tended to indicate the same individual, they cited *P. & M. Bank v. Borland*, 5 Ala. Rep. 531.

Where parties have agreed upon the boundaries of their lands, and possession has been taken and improvements made upon the faith of such agreement, it shall be binding; and it is competent to prove the facts by parol evidence. *Jackson v. Bowen*, 1 Caine's Rep. 361; *Jackson v. Vedder*, 3 Johns. Rep. 8; *Jackson v. Dieffendorf*, 3 Johns. Rep. 269; *Jackson v. Ogden*, 7 Johns. Rep. 245; *Rockwell v. Adams*, 6 Wend. Rep. 467; *Tarrant v. Terry*, So. Ca. Rep. 239.

Acquiescence for a long time even in an erroneous location, will conclude the party making or acquiescing in it. *East India Co. v. Vincent*, 2 Atk. Rep. 82; *Lusk v. Druse*, 4 Wend. Rep. 313; *Buckhanan v. Stewart*, 3 H. & Johns. Rep. 329; *Houston v. Mathews*, 1 Yerg. Rep. 116; *Wilson v. Hudson*, 8 Id. 398; *Boyd v. Graves*, 4 Wheat. Rep. 513; *McCormick v. Barnum*, 10 Wend. Rep. 104; *Kip v. Norton*, 12 Wend. Rep. 130; *Dibble v. Rogers*, 13 Wend. R. 536.

G. W. GAYLE, for the defendant in error.

COLLIER, C. J.—We can conceive of no objection to the admission of the evidence to show that Sheppard S. Johnson, one of the grantees in the patent, was named Sheppard Spencer Johnson, and that he is the same person who executed the deed under which the plaintiff claims, by the name of Spencer S. Johnson. This testimony does not contradict either the patent or the deed. It shows nothing more than a transposition of the first and middle name—explains an ambiguity, if indeed it be one, which at most is latent—removes a seeming discrepancy—makes the deed harmonize with the patent, and thus traces to the plaintiff a complete title from the United States. In the absence of proof, we are by no means sure that the similarity of the names is not such, as to warrant the inference that they were intended to indicate the same individual; but as this question does not necessarily arise, we will not consider it. See 2 H. & McH. Rep. 155; 2 H. & Johns. Rep. 53, 366; 3 Id. 469; 1 H. & Gill's Rep. 441.

The law does not require any technical or precise form of

words in the designation of property conveyed by writing. But the intention of the parties to be collected from the whole deed, if not repugnant to law, must prevail; if, however, there is any doubt about the matter, the construction must be most favorable for the grantee, and strongly against the grantor. 2 H. & McIl. Rep. 523; 2 H. & Johns. Rep. 112; 3 Id. 329; 4 Id. 228; 3 Mass. Rep. 352; 6 Id. 24; 7 Id. 381; 15 Pick. Rep. 23; 8 Johns. Rep. 394. Under the influence of these principles, we should have no difficulty in concluding that by the "south part" of the half quarter section, was meant the south half, without reference to quantity; but it is insisted that the additional words, viz: "containing forty 10-100 acres," prescribe the extent of the lands conveyed, and that the defendant is entitled to no more. It has been said that the meaning of a deed, and what are the boundaries of the land it proposes to convey, are questions of construction for the court; but the locality of the premises must be determined by the jury. 1 Dev. & Bat. Rep. 425; 8 Johns. Rep. 495. So a clear general description of the premises in the deed, is not controlled by any subsequent expressions of doubtful import in respect to certain particulars. 2 N. Hamp. Rep. 175. But words of general description may be limited and rendered certain by terms more precise and particular. 5 Id. 1; 14 Pick. Rep. 128. In *Bott v. Burnell*, 11 Mass. Rep. 163, it was held that general words descriptive of the land conveyed, will not be restrained by words added *ex majore cautela*, or by affirmative words more restrictive, which do not make a general description ambiguous or uncertain. If the descriptive words are without ambiguity, and followed by a clause repugnant to them, this clause must be rejected. 3 Pick. Rep. 272; 7 Verm. Rep. 100; 7 Johns. Rep. 217. In *Large v. Penn*, 6 S. & R. Rep. 488, land was conveyed by boundaries, courses and distances, and by reference to a plan of partition; it was held, that there was no implied covenant that the number of acres was correctly stated—the grantee was entitled to all within the boundaries, be they more or less. If there be several descriptions of the premises in a deed, such construction, if possible, shall be given to it, as will satisfy each. 10 Conn. R. 23. The grantor conveyed "a certain lot of land, the whole

of lot No. 20, except fifty acres embraced in a deed to S. W., the lot to contain two hundred acres by measure, besides the fifty acres:" *Held*, that this was a mere description, and not a covenant as to quantity. 2 N. Hamp. Rep. 287. See 1 S. & Mar. Ch. Rep. 388, 437.

In *Walsh v. Ringer*, 2 Ham. Rep. 327, it was decided that the words "seventy acres of land, being and lying in the south-west corner of the south-west quarter of section 14, township 12, range 5, of land sold at L," are a good description in a deed, and include the land in an equal square. And a deed which professed to convey a moiety of a tract of land, but describes the part conveyed by metes and bounds, conveys only such part as is within the limits designated, although it may be less than a moiety. 1 H. & Johns. Rep. 167. See 1 Ala. Rep. 415, 320.

If the deed under which the defendant claims had conveyed the south half of the half quarter section, and designated the number of acres it contained, the designation of quantity would not restrict the general description; for the half of the tract would be ascertained by reference to the whole, and would pass, though the number of acres was more or less than are stated. This conclusion is the result of reason, and is fully supported by several of the cases cited. But it is only by construction the words "south part" can be intended to mean the *south half*, when unexplained by other words restricting or enlarging their meaning. In themselves, and in the absence of every thing else, they may be regarded as descriptive of the land conveyed; and upon the principle, that in a case of doubt and uncertainty the deed shall be construed most strongly against the grantor, and that such an interpretation shall be placed on the instrument as will make it operative *ut res magis valeat quam pereat*. But here the additional words as to quantity must be looked to as furnishing a controlling guide in the construction of the deed, and whether they are taken as a part of the description of the premises, or as a covenant that the land contains so many acres, is altogether unimportant. Whether considered in one sense or the other, they show how much of the south part is conveyed by the deed to the plaintiff. See 1 Ired. Rep. 252, 283; 2 Id. 170; 4 Dev. & Bat. Rep. 133, 241.

It is not allowable to control the deed by the patent; for although the patent may describe the half quarter as containing eighty 20-100 acres, yet this does not prove that a deed conveying one-half of this quantity was intended to grant an equal moiety of the lands embraced in the government survey. The plaintiff may have been aware that the estimate made by the United States surveyor was incorrect. Be this as it may, looking to the deed it cannot be intended that the plaintiff conveyed more land than it expresses on its face—thus far the deed would be operative, even if the surveyor's estimate had been for too little instead of too large a quantity. If it appeared that the deed referred to, and adopted the estimate stated in the patent as correct, then, perhaps, a different conclusion might be attained.

The deed must be held to speak its own meaning, and cannot be limited, enlarged or explained by parol evidence, so as to make it operative otherwise than its terms indicate.—4 Wend. Rep. 369; 13 Pick. Rep. 121; 4 Day's Rep. 395; 3 McC. Rep. 269; 6 N. Hamp. Rep. 205; 12 Johns. Rep. 77, 427, 488; 11 Wend. Rep. 422; 3 Call's Rep. 194; 3 H. & Munf. Rep. 399; 2 Leigh's Rep. 630; 7 Id. 632; 1 How. Rep. (Miss.) 591; Walk. Rep. (Miss.) 115; Freem. Ch. Rep. (Miss.) 53; 4 Stewt. & P. Rep. 96; 2 Porter's Rep. 29; 5 Id. 498; 1 Ala. Rep. N. S. 161; 2 Id. 280; N. Car. T. Rep. 34; 4 Hawks' Rep. 64; Monr. Rep. 63; 6 Id. 182; 2 H. & McH. Rep. 57; 3 Id. 437; 2 H. & Johns. R. 498; 3 Id. 329; 5 Id. 155; 6 Id. 24, 435; 1 H. & Gill's Rep. 172, 438. These citations very satisfactorily show, that while in some cases it is allowable to prove by parol, matters which are extrinsic of, and not concluded by the deed, it is not admissible thus to contradict the description of the land it purports to convey; so as to give to the deed an operation different from what its terms import. If it was the intention of the parties, that the deed should have conveyed a moiety of the half quarter section, although it contained more than the estimated quantity, upon satisfactory proof being made of this fact, it is competent for a court of chancery so to reform the deed as to give effect to the intention. 3 S. & Mar. Rep. 67; 7 Id. 340; 1 Ala. Rep. N. S. 161; 8 Id. 345.

In respect to boundaries, it is said, if they are ancient they

may be proved by reputation. 2 Litt. Rep. 159; 2 Marsh. Rep. 158; 3 Rand. Rep. 44; 6 Mass. Rep. 441; 3 Ham. Rep. 283; 6 Pet. Rep. 341; 10 Johns. Rep. 377; 4 Day's Rep. 265; 4 Dev. Rep. 342; Cooke's R. 142; 6 Litt. R. 7. Declarations of persons who are dead, and the testimony of aged witnesses have been received upon a question of boundary. 12 Pick. Rep. 532; Pet. C. C. Rep. 496; 4 H. & McH. Rep. 158. So, evidence of the possession of proprietors of adjacent tracts in reference to a division line has been admitted against a party who recognized such possession. 6 Wend. Rep. 467. But the declarations of deceased persons, as to boundaries, are not admissible, when it appears that they had an interest in making them. 4 N. Hamp. Rep. 213; 8 Leigh's Rep. 697. See however, 11 Price's Rep. 162.

In *some* of the cases, the declarations of deceased persons have been rejected because they were made *post litem motam*, and it was held that it is indispensable to their admissibility that they should be made *ante litem*. It is said, in all cases where these declarations have been received, it was first made to appear that the declarant was dead; and that several cases have expressly decided that this is an essential condition. 3 McC. Rep. 258. To show that he is beyond the reach of the process of the court is not enough. 2 N. Car. L. Rep. 635; 10 Serg. & R. Rep. 275; 1 H. & McH. Rep. 531. But a distinction, it is said, must be observed as to proving declarant's death, between particular declarations coming from individuals and general reputation. In the former case, death must be proved. In the latter, it is never required. 2 Phil. Ev. C. & H's Notes, 628 to 638.

It is perfectly clear, the declaration of Murphy was properly rejected. There was no *res gestae* to which it was referable—nor does it tend to establish a general reputation; but merely the opinion of the declarant, as to the dividing line of the section, or an assertion by him that it was run by a surveyor. Placing out of view every other objection to this testimony, its exclusion was warranted by the failure to show that the evidence of Murphy could not have been obtained, either by his personal attendance in court. or by deposition.

By the act of 1836 "for the relief of tenants in possession against dormant titles," it is enacted, that "in any suit which shall be commenced in any of the courts of this State, for the possession of lands and tenements, it shall be lawful for the defendant, at any time before the trial of such suit, to suggest to the court, that he and those whose estates he has in the lands or tenements sued for, have had adverse possession of the same for three years next before the commencement of such suit, and that he, or those whose estate he has, have made permanent and valuable improvements on the lands untenanted, sued for, during the time he or they have had adverse possession of the same. And the jury trying the suit, if they shall find for the plaintiff, shall at the same time inquire if the suggestion so made be true or false; if false, they shall return a verdict as in ordinary cases for the damages sustained; but if true, they shall assess the value of the improvements at the time of the trial, which have been made by the defendant, or by those whose estate he has: and shall assess the value of the lands or tenements, which they shall return a verdict for, and shall also assess the value of the use and occupation of the same, without considering the increased value thereof by reason of such improvements as shall have been made by the said defendant, or by those whose estate he has. And if the value of the use and occupation, as assessed, shall exceed the value of the improvements, as assessed, the court shall render a judgment against the defendant for the excess." It is further provided by the second section of the same act, that "where the value of the improvements so assessed, shall exceed the value of the use and occupation, no writ of possession shall be issued for the term of one year after the rendition of judgment, unless the plaintiff or his legal representative shall pay to the clerk of the court, for the defendant, the excess of the assessed value of the improvements over the value of the use and occupation; and if the plaintiff, or his legal representatives, shall neglect for the term of one year, to pay the excess in value of the improvements, and the defendant or his legal representatives, shall, within three calendar months after the expiration of the year, pay to the clerk of the court, for the plaintiff, the value of the lands or tenements as assessed by

the jury, then the plaintiff shall be forever barred of his writ of possession, and from ever having or maintaining any action whatever against the defendant, his heirs or assigns, for the lands or tenements recovered by such suit; and if the defendant, or his legal representatives, shall not, within the said three months, avail him, or themselves of the benefit of this act, the plaintiff, or his legal representatives, may sue out a writ of possession as in ordinary cases. Clay's Dig. 320, § 47, 48.

In *Hollinger v. Smith*, 4 Ala. Rep. 367, we held, that this statute gives a cumulative remedy, and does not repeal the common law, which maintains, that where the defendant in an ejectment, or similar action, is in possession under color of title, and is not a mere trespasser, he is entitled to recover the value of the permanent improvements by way of deduction *pro tanto* from the mesne profits.

Several of the States have enacted laws similar to our own in principle; how far they differ in terms we are not informed, as we have not compared them. In Tennessee it has been held, that equity enjoins the successful claimant from taking possession of land until by the rents and profits the improvements are paid for, or they are otherwise compensated; and that the general principles laid down in the statutes of that State of 1796, and 1805, are perfectly coincident with the relief previously established by courts of equity. Cooke's Rep. 294. *Further*, the nature of the claim to be exhibited by a person claiming the value of improvements, should be such as would protect him under the statute of limitations. 2 Tenn. Rep. 341, 392. But under the earlier Tennessee act, which makes seven years peaceable possession a bar, it has been held, that although a regular title in form is not necessary, a mere naked possession will not be sufficient; but the defendant seeking to avail himself of his possession, must show color of title. Cooke's Rep. 356. Possession of land in virtue of a bond for seven years, is not sufficient to protect a party under the statute of limitations. 2 Tenn. Rep. 391. Color of title is where the possessor has a conveyance of some sort by deed or will, or inheritance which he may believe to be a title. 4 Hayw.

Rep. 182. A deed *prima facie* good though not legally operative, gives color of title: as where the conveyance is made by a person apparently having an authority to convey, which conveyance would actually have passed the title, had the circumstances existed as supposed. 5 Hayw. Rep. 286; Peck's Rep. 215. Or where the defendant shows a claim of title founded on a grant, or *equity*, or apparent equity.—Peck's Rep. 234. See also 2 Yerger's Rep. 200, 249, 288; 6 Id. 280. Under the act of limitations of Tennessee of 1819, it has been decided, that it does not require even color of title to protect a party in the possession of land; that it is only necessary for him to show that his possession was taken under a claim hostile to the real owner, and that such hostility continued during the period of seven years. But it is added, that, that act was not intended to bar a recovery of land so held, except as to so much as is actually occupied by inclosure, definite, positive, and notorious. 3 Yerger's Rep. 397. *Further*, adverse possession is exclusively a question of fact for the jury. 3 Yerger's Rep. 435. We have thought it proper to make these citations of the decisions in our sister State, upon her acts of limitation in respect to real estate, that it may be seen what is there regarded as adverse possession in the meaning of her statutes, which entitle tenants in possession to the value of their improvements against persons who recover the land on which they are made, by a paramount title. It may be proper to remark, that the cases in 2 Tenn. Rep. 341 and 392, were decided previous to 1819, and that it may be necessary for the tenant to make out an adverse possession by proof of color of title, although the act of 1819 modified the construction given to its predecessors.

It has been decided, under a statute of Kentucky, that improvements made by one who occupies land *mala fide* will not be respected, where he is ousted by the party in whom the title is vested. 2 Bibb's Rep. 11. But a *bona fide* possessor, is entitled to all necessary, lasting, and valuable improvements made by himself or a stranger, on the premises, deducting rents and deterioration of soil. 2 Bibb's Rep. 45; 3 Marsh. Rep. 202, 388; 4 Bibb's Rep. 199; 4 Litt. Rep.

371. So a man who occupies land according to the boundaries in his deed, will be considered as a *bona fide* occupant, and entitled to pay for his improvements; unless it is proved that he knew the true lines of the survey were variant from the courses, &c. called for in his deed. 2 Litt. Rep. 280. Improvements made under a parol contract of lease, which is afterwards avoided, shall always be paid for. 3 Id. 391, 403. Where a person has purchased land by a verbal contract, under which he enters and makes permanent and valuable improvements, if the vendor disaffirms the contract and recovers the possession, the vendee is entitled to recover the value of such improvements, and the vendor to be compensated for the use and occupation. 2 J. J. Marsh. R. 517. See further, 1 J. J. Marsh. Rep. 401; 4 Monroe's Rep. 60; 8 Wheat. Rep. 1; 3 Atk. Rep. 130. For the doctrine of adverse possession, especially in respect to the operation of the statute of limitations, see 2 Crabb's Real Property, § 2380 and 2382, and citations in notes; Taylor v. Horde, 2 Smith's Leading Cases, 324, with English and American notes.

"An actual, continued, visible, notorious, distinct and hostile possession," is adverse within the statutes of limitation of most, if not all the States, as well as some of the English enactments; but we should hesitate to lay these down as the only essentials of "adverse possession" within the meaning of the act of 1836. The case before us does not, however, make it necessary to define with particularity the character of the possession contemplated by the statute. It was certainly quite enough for the defendant to have shown that his occupancy was *bona fide* under color of title. His possession could be vindicated as we have seen, by proof of entry under a mere verbal contract of sale, or by a title at law or in equity, either real or apparent; and some of the cases maintain, that a possession under an honest impression that the party is entitled to the premises, and without notice of a conflicting claim, gives him a right to demand compensation for permanent and valuable improvements made thereon. It may perhaps be inferred from the deed under which the de-

fendant claimed, when taken in connection with the patent, that he supposed he was the proprietor of a moiety of the half quarter section. Certainly upon the question of the *bona fides* of his possession the evidence is such as should have been referred to the jury. And for the purpose of showing the defendant's occupancy was adverse to the plaintiff, within the statute, parol evidence that it was the intention of the plaintiff to sell the half of the tract was admissible; although the deed could not be thus aided, so as to give to it an operation more enlarged than its terms import. We have said, that if the deed did not conform to the intention of the parties, it might be remodelled so as to make it effect the purpose contemplated by them; if then the deed did not express the contract truly, the defendant has an equity which justifies his possession, and entitles him to demand a verdict for the value of such improvements as the act designates.

What we have said will indicate that, that the circuit court took a view of the defendant's rights altogether too restricted; but should have admitted parol evidence of the declarations of the plaintiff, that he had sold one half the tract, and charged the jury, as we have intimated, upon the evidence before them. For the error in the ruling on this point, the judgment is reversed, and the cause remanded.

TURNIPSEED v. McMATH.

1. A release obtained by fraud is void.
2. M was living separate from his wife, who had gone to her father's, and M had commenced a suit to recover from T, the father, certain slaves which he had received upon the marriage. Whilst this suit was in progress, the father stated to one H, that if M would dismiss his suit, and execute a release, he would put him on a place, let him have his family, and the use of the slaves, and if he would do right, at the end of five years, he would

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have regained his confidence. H did not know M at this time, and was not requested to communicate this to him, by T, but in a few days sought him out, and told him what T had said. Soon afterwards he visited T, and proposed to inform him what M had said. T inquired, if witness was sent by M, and being informed he was not, said it was well—that he should not receive propositions from M, but through men of his own age, and named Roper, and others, as proper persons. Roper then, at the instance of M, visited T, to endeavor to bring about a reconciliation, but T declined to receive any proposition, or to grant an interview to M, until he had executed a release, and recognized the slaves to be his. This being communicated to M, he executed the release, and dismissed the suit; the parties met, and the release was delivered. M and T had a private interview, at the end of which, T remarked aloud, that M had satisfied him, and he took back every thing he had said against him, adding, there were some things his family required explanation of, or Mrs. T. could not be reconciled. M, and his wife, have not lived together since, but the breach between the parties has widened; and there was no proof that T had made any efforts to bring about a reconciliation, or to do any of the acts he had proposed to H to do, if a release was executed by M. Held, that this testimony was relevant, and proper to go to the jury, as evidence of the inducements held out by T, to M, to execute the release, and of the fact, that he knew they had been communicated to M, and had produced on the mind of M, the impression, that if he executed the release, his family would be restored to him.

Error to Pickens Circuit Court. Before Hon. G. W. Stone.

THE plaintiff below, brought trover against the defendant, in the circuit court of Pickens county. The writ was issued in April, 1845.

The defence relied on, was a release, executed by the plaintiff to the defendant, bearing date December, 1844, which is under the seal of the plaintiff, and is as follows: "Know all men by these presents, that I, Joseph W. McMath, do hereby quit, and release, all my right, title, and claim, to certain negro slaves, for which I have instituted a suit of trover, by writ from the circuit court of Pickens county, on the second day of October, 1844. The names of said slaves, are mentioned on the cause of action indorsed on said writ—Clarissa, Mary and Nelson—now in the possession of said Turnipseed. Also I release all my claim to all, or any other property, and money, I may have, in virtue of my marriage with the daughter of said Turnipseed, and I also agree,

not further to prosecute my aforesaid action of trover. Given under my hand, and seal, this the 12th December, 1844." It was shown that the plaintiff had married the daughter of the defendant, and on his marriage, had received the negroes from the defendant, the father. That the plaintiff and his wife had separated, that she had returned to her father, and was living with him. That the negroes were in the possession of the defendant, at the time the release was executed to him. With the view to avoid the effect of the release, the plaintiff offered one Hatter as a witness, who stated that in the early part of December, 1844, the defendant sent for the witness, who offered his services to him, to bring about a reconciliation between the defendant, and his wife's family. That they, the witness and Turnipseed, had a conversation, during which the defendant said to witness, you are a reasonable man, and if McMath would act as liberally as you propose, we could make up our family difficulties; and then said to the witness, that if McMath would dismiss the suit he then had for the negroes, and execute a release to them, that he would put him on a place, let him have his family, and the use of the slaves, and if he would do right, at the end of five years, he (McMath) would have regained the confidence of him (the defendant.) The witness stated that he did not know McMath, at this time, nor was he requested to communicate this to him. That he sought McMath in a few days, and communicated to him what Turnipseed had said.

The defendant's counsel here objected to this testimony, but the court permitted the witness to proceed, and reserved the admissibility of this testimony, until the whole testimony should be brought out; to which the defendant excepted.

The witness then stated, that in a few days he visited Turnipseed, and proposed to inform him, what McMath had said. The defendant inquired of him, if he had come at the request of McMath. He (witness) replied he had not. Turnipseed said it was well, for if he had, he should invite him to leave, as he did not intend to receive propositions from the plaintiff, unless through some man of his own age, and then named Roper and others, through whom he would receive propositions.

It was then shown that an interview, in a day or two after this, took place between Roper, McMath, and Hatter the witness, which resulted in an agreement, between Roper, and McMath, that Roper should visit Turnipseed, on the business above disclosed. Hatter testified that at this interview, all the matters before spoken of were talked over. Roper said, there was conversation between them, and the subject was the reconciliation of McMath and his family. Roper then visited Turnipseed, and when he announced the object of his visit, Turnipseed replied, that he would receive no proposition, nor grant an interview to McMath, until he (McMath) had dismissed the suit pending against him, and recognized the slaves to be his. Roper communicated this determination to McMath. McMath then dismissed the suit, and executed the release. McMath and Turnipseed then met, and the release was delivered. They had a private interview at the residence of the defendant, at the end of which the defendant remarked aloud, that McMath had satisfied him, "I take back every thing I have said against him." This was in the presence of McMath, the wife of defendant, and also the wife of plaintiff. But defendant then said, there are some things my family require satisfaction, or explanation of, or Mrs. Turnipseed could not be reconciled, and the wife of McMath said nothing. The interview ended. The plaintiff and his wife have not lived together, the breach between the parties widened, and it does not appear that Turnipseed has done any thing to bring about a reconciliation between McMath and his family, or that he has attempted to perform any thing he said to Hatter he would do. The whole testimony having been brought out, the defendant's counsel then moved the court to exclude from the jury, the conversation the defendant had with Hatter, at the first interview, which the court refused. The court charged the jury, that they must look to all the evidence, and ascertain if Turnipseed had acted in good faith. That if their judgments were convinced that Turnipseed had held out false pretences to McMath, and thus had procured the release, for the purpose of getting the advantage of him, then the release thus procured by fraud, was null and void, unless the defendant had in good faith attempted to carry out the expectations

and wishes thus created. To this charge the defendant excepted.

HUNTINGTON, for plaintiff in error, contended, that the first conversation between the witness Hatter, and the plaintiff in error, was not a part of the *res gestae*, so far as the execution of the release was concerned. That to give it this character, three things must concur. 1. That the execution of the release was then in contemplation between McMath and Turnipseed. 2. That Turnipseed conversed with the witness as his agent to negotiate the transaction. 3. That the plaintiff in error designed, or expected, that McMath would be informed of the conversation, and make it the basis of his own action; and he contended that these constituents were all wanting, and the testimony therefore inadmissible. He cited *Enos v. Tuttle*, 3 Conn. 250; 1 Greenleaf Ev. 120; *Cozens v. Stephenson*, 5 S. & R. 421; *Irvine v. Buckaloe*, 12 Id. 35; *Smith v. Williams*, 1 Murphy, 126; *Paysant v. Ware & Barringer*, 1 Ala. 165; *Abney v. Kingsland*, 10 Ala. 355; *Bradford v. Bush*, Id. 386.

PORTER & BRODIE, contra.

DARGAN, J.—It is unnecessary to refer to authorities to show, that if a release of a right is obtained by fraud, the release is void; for fraud will vitiate all instruments, however formal, or solemn in their character. The charge of the court, therefore, was not erroneous, if it was not given upon improper evidence; and the only question in the case, is, does the testimony of Hatter, conduce to show fraud; in other words, was it irrelevant, and therefore inadmissible?

To determine on the relevancy of the testimony of Hatter, it is proper to consider of the condition of the parties, before the release was executed. McMath had sued Turnipseed, and the suit was pending. Turnipseed, in a conversation with witness, stated, that if McMath would dismiss his suit, and convey to him the slaves, he should have his family, the use of the negroes, and that he would put him on a place to live, &c. This, it is true, Turnipseed did not request witness to communicate to McMath, but he did communicate it,

Turnipseed v. McMath.

and in consequence of this communication, another interview took place between the witness, and the defendant Turnipseed, when Turnipseed stated, he would receive no communications from McMath, unless through a man of his own age, and named Roper, and others, through whom he would receive communications. This led to an interview between the plaintiff, Hatter, and Roper, when the conversation before alluded to between Hatter and the defendant was talked over, and Roper agreed to visit Turnipseed, with the view to a reconciliation; but Turnipseed declined receiving any proposition from McMath, or of having an interview with him, until he had executed the release, and dismissed the suits. McMath, anxious, it seems, to have his family restored to him, and to reconcile all difficulties, dismissed the suit, and executed the release. What impression then existed on the mind of McMath, and why did he do it? It was because he had been informed of what Turnipseed, his father-in-law, had said to Hatter and to Roper, and Turnipseed knew that the conversation he had with Hatter, had been communicated to plaintiff. The fact that Hatter visited him, and wished to communicate to him what McMath was willing to do, is evidence at least to go to the jury, as conducive to show that Turnipseed knew, when he accepted the release, that it was executed in consequence of impressions made on the mind of McMath, by his own words, communicated, it is true, without any request of Turnipseed, but producing the same effect on the mind of McMath, as if he had requested them to be communicated. With the knowledge, therefore, of the impressions on the mind of McMath, that in consideration of the release, he (Turnipseed) would endeavor to re-unite McMath and his family, and that he would provide for them, as stated, he accepted the release. Has he endeavored in any manner to carry out the expectations of McMath, created by him, under the influence of which the release was executed? If he has, the record does not show it; but on the contrary, after expressing himself satisfied, he says, there are some things about which my family must be satisfied, and this is all that he has done. Under all the proof, then, we draw these conclusions: The testimony of

Hatter, in connection with all the proof, tends to show, that the release was executed and delivered by McMath, under the impression that Turnipseed would permit, or bring about a re-union between McMath and his family. It tends further to show, that Turnipseed knew that this impression existed on the mind of McMath, that he knew that his (Turnipseed's) words had been repeated to him, (McMath) and had produced those impressions. There is not the slightest evidence that Turnipseed ever used any effort to comply with the wishes or expectation of the plaintiff; under these circumstances, we cannot pronounce the testimony irrelevant. It is indeed but slight, yet it cannot be altogether rejected. It was proper to refer it to the jury, to be by them weighed. They could attach such weight to it as they deemed right. The court therefore did not err, in permitting the testimony of Hatter, under all the circumstances, to go to the jury, and his charge to the jury was entirely correct. The judgment is therefore affirmed.

CHAPMAN v. GLASSELL.

1. Although a deed recites, that the grantor, has "granted, bargained, and sold," a tract of land, the title will not pass, if from the whole instrument, and a contemporaneous agreement executed by the parties, it is evident a title bond was intended by the parties, and not a conveyance of the land in *presenti*.
2. A vendee, holding only a bond for title, cannot resist a recovery at law, when the vendor sues to recover the possession. His remedy is in equity to file a bill to redeem. A purchaser from the vendee without notice, is in no better condition, as it was his duty to inquire into the nature of the title he was purchasing. Notice to quit previous to the institution of the suit is not necessary.
3. It is no obstacle to the maintenance of an action at law, by the vendor, to recover the possession, that he is prosecuting a suit in chancery to foreclose his equitable mortgage.

Error to the Circuit Court of Sumter. Before the Hon. G. W. Stone.

TRESPASS to try title, instituted in the circuit court of Sumter county, by Andrew Glassell, against the plaintiff in error, to recover possession of certain land, particularly described in the writ and declaration, and damages for their detention. The cause was submitted to a jury, and a verdict was returned for the plaintiff below, for the land and \$238 20 damages, upon which judgment was rendered. It appears from a bill of exceptions, sealed at the trial, that the plaintiff below proved a regular chain of title from the government of the United States to himself, and also proved the defendant in possession at the time of the commencement of the suit, and the value of the rent accruing upon said land. The plaintiff in error then proved, and read in evidence, a title bond, made by the said Glassell to one Alexander Chapman, which recites that "the said Glassell, in consideration of the sum of \$3600, the receipt whereof is thereby acknowledged, hath this day granted bargained and sold unto Alexander Chapman the following described tracts of land," (here follows a description of the land.) "Now should the said Glassell make to the said Alexander Chapman titles in fee simple to the above mentioned tracts of land, then this obligation to be void, otherwise to remain in full force and effect. It is further agreed between the parties, that said Glassell make such titles as he has to the above land." It was further shown, that at the date of the above instrument, viz: the 18th November, 1839, said Alexander Chapman went into possession of the premises described in said bond and declaration, and on the 24th of November, 1840, he sold said land to the plaintiff in error, and at the same time executed to him a deed of conveyance for the same. That the plaintiff in error thereupon entered upon the land, and was in actual possession at the commencement of this suit. The said Glassell then read in evidence to the jury an agreement, which was proven to have been executed on the same day, upon which the title bond above referred to was made, and to

have formed a part of the same transaction, by which said Alexander Chapman, in consideration of the sale of said land, agreed, as a condition to be performed by him, before Glassell should be bound to execute to him a deed for said land, to procure the extinguishment of certain liabilities of said Glassell upon two notes, one payable to Edwin, and the other to Mary E. Davis, for amounts specified in the instrument. The defendant had no knowledge at the time of the conveyance from Alexander Chapman to him, of the existence of the last named agreement. That Alexander Chapman had not performed the stipulations contained in this agreement, but the defendant, since the conveyance to him, had paid to Mary E. Davis about \$1600; Glassell having himself paid a considerable amount on the notes. It further appears, that Glassell had filed his bill in chancery to subject the land to the payment of the unpaid purchase money, which bill was pending at the time of the trial. There was no proof of any demand by plaintiff below of the possession, nor was any notice to quit given to defendant in the action, before the suit was instituted.

Upon this state of facts, the defendant in the court below requested the court to charge the jury, that if they believed from the proof, that the said defendant, when he received a conveyance and went into possession of the land sued for, had no notice that the purchase money remained unpaid, the plaintiff had no right to recover of the defendant in a court of law. 2. That the legal effect of the instrument given by Glassell to Alexander Chapman was to convey to said Alexander the legal title in the land therein described, and that if defendant (R. Chapman) purchased and received a conveyance without notice of the purchase money remaining unpaid, the plaintiff could not recover. 3. That under the facts proved, the plaintiff had no right to recover, unless before action brought, he had demanded the premises in question, or given the defendant notice to quit. These several charges were refused, and in lieu of them charged the jury, that if they believed the facts stated had been duly proved, the plaintiff had a right in law to recover. The plaintiff in error assigns as cause for reversal, the matter of the bill of exceptions, and that the court rendered judgment for damages

REAVIS and LYON, for plaintiff in error, argued—

1. The instrument executed by Glassell, conveyed all the title to Alexander Chapman, that Glassell had. Clay's Dig. 156, § 31, 33, 35; 7 Sinesdes & M. Rep. 488.

2. It was at least a covenant to stand seized to the use of Chapman, and if any equities subsisted between Glassell and Chapman, not apparent on the instrument, they could only be enforced in a court of chancery. Clay's Dig. 156, § 35.

3. The legal title subsequently obtained by Glassell, inured to the benefit of Alex. Chapman, and consequently to his vendee. McGee v. Andrew & Eastis, 5 S. & P. 426; Kennedy & Moreland v. Heirs of McCartney, 4 Por. 142.

4. The instrument shows the payment of the purchase money, and that nothing was to be done by Chapman in order to obtain a title; Chapman, the plaintiff in error, purchasing without notice of the collateral agreement, is not affected by it. Mallory v. Stodder, 6 Ala. R. 801.

5. Chapman and his vendee being lawfully in possession, under a contract of purchase, could not be sued at law for the possession, without a previous demand, or notice to quit.—Right ex dem Lewis, et al. v. Beard, 13 East, 210.

6. The vendee of Alexander Chapman is substituted to all his rights; and he being in possession under a contract of purchase from the plaintiff, was not liable to damages for detaining the premises, even after the law day, if there was any; for if the plaintiff was entitled to recover, he could only hold the land until the rents and profits paid the incumbrance. Haley v. Bennett, et al. 5 Porter, 452.

7. Glassell had his election, either to sue at law or in chancery; having elected to sue in chancery, as shown by the bill of exceptions, he had no right to recover at law.—Haley, et al. v. Bennett, 5 Por. 452.

8. The plaintiff below could not recover the premises by a suit at law; the decision to the contrary in Haley v. Bennett, 5 Porter, 470, is unsupported by authority, and is not law.

SMITH, for defendant.

CHILTON, J.—Most of the points presented by the record in this cause for reversion are of easy solution. The instrument executed by Glassell to the vendor of the plaintiff in error, Alexander Chapman, cannot, by any fair rule of construction, pass the *legal title* to the land embraced in it. By its terms, it recites that the said Glassell, for and in consideration of the sum of \$3600, the receipt of which is thereby acknowledged, has granted, bargained and sold unto the said Alexander Chapman, the premises, &c., but the condition upon which the instrument is to be void is, that the said Glassell make to the said Chapman, title in fee simple to the land, &c.

Now, contracts are to be taken and construed according to the intent of the parties, and this intent should be ascertained from the whole instrument. Ely, use, &c. v. Witherspoon, 2 Ala. R. 131. If the parties had intended this instrument to operate as a conveyance *in praesenti*, why does the obligor stipulate, at a future day to give, and the obligee to receive, title in fee simple to the land? Did this construction admit of any doubt, the meaning of the parties is put beyond all question, when we consider the contemporaneous agreement signed by Alexander Chapman, which, after reciting the execution of the instrument above referred to, and designating it “a title bond,” expressly provides as a condition to be performed before he can demand title, that he is to pay certain notes outstanding against said Glassell in the hands of Edwin and Mary E. Davis. These instruments, made at the same time, in regard to the same transaction, are to be taken together. Their legal effect is that of an obligation on Glassell to make title to the land described when Alexander Chapman shall have performed the condition, in the payment or extinguishment of the notes mentioned in the agreement signed by him.

Regarding Alexander Chapman as holding under a bond for title, he had only an inchoate equity, which he could perfect by the payment of the purchase money, and being destitute of a *legal title* to the premises in suit, he did not, by his conveyance to the plaintiff in error vest any such title in him. Thus situated, the defendant below could not resist a recovery on the part of Glassell, the vendor, but by filing

his bill to redeem the premises ; the vendor's lien for the unpaid purchase money being in the nature of a mortgage.—Haley, et al. Bennett, 5 Porter, 452 ; Roper v. McCook, et al. 7 Ala. R. 318, and cases there cited. Nor can we perceive how the title of the plaintiff in error can be aided by the statutes referred to by the counsel. By the 20th section of the act passed in 1803, (Clay's Dig. 156, § 31,) it is provided that the words, grant, bargain, sell, *occurring in deeds required by the act to be recorded*, shall be adjudged an express covenant to the grantee, his heirs, &c., of seizin on the part of the grantor, &c., and for quiet enjoyment. If we are right in our construction as to the legal effect of the instruments under which the plaintiff in error claims, and of this we feel no doubt, the statute above noticed can have no application to the case, as it applies to conveyances, not to bonds for title. So neither can the plaintiff in error be aided by the statute of uses, (Clay's Dig. 156, § 35,) the instruments under which he claims title not coming within the description of any of the conveyances or covenants specified in the statute. The effect of this statute is, to transfer the property to the person entitled to the use, dispensing with livery of seizin. 1 Ala. Rep. 273.

It is insisted, that as Alexander Chapman went lawfully into the possession of the premises sued for, and conveyed to the plaintiff in error, who purchased without notice of any lien for the purchase money, his possession should be protected—at all events there should be a demand of possession, and notice to quit, before he is liable to be sued as a trespasser. We think the law is otherwise. Regarding the transaction in the character of a mortgage, the plaintiff in error can occupy no better condition than the mortgagor. In the language of Lord Mansfield, in Kuck v. Hall, Doug. 22, "whoever wants to be secure when he makes a purchase, should inquire after and examine the title deeds." Want of notice of a fact, which is the result of a want of that diligence which the law requires for its ascertainment, furnishes no ground for protection. As it respects demand of possession, or notice to quit, Mr. Powell, in his work on Mortgages, (vol. 1, p. 176, a,) lays down the doctrine, that after

breach of the condition, the mortgagee may consider the mortgagor as tenant by sufferance, and evict him by ejectment, as an ordinary tenant of that description. He also adds, "that a notice to quit, or demand of possession is not necessary to the success of such ejectment." We are strongly inclined to the opinion that such is the correct rule, even as it respects technical mortgages, although it has been ruled differently in New York; yet the Supreme court of that State have repeatedly held, that the case of a vendor suing to recover land after default of payment by the vendee, is an exception to the rule requiring notice to quit. *Jackson v. Moncrief*, 5 Wend. 26; *Jackson v. Miller*, 7 Cowen, 751, and authorities there cited. We think the circuit court very properly refused to instruct the jury, that proof of demand of possession, or notice to quit, was necessary to sustain the plaintiff's action. See also, *Jackson v. Hopkins*, 19 Johns. 487. The right to maintain this action is not at all affected by the pendency of the chancery proceedings to sell the land for the purchase money. The mortgagee has, after default of payment, the right to the possession, and having possession, has the right to foreclose. "He may sue at law upon his bond, or covenant, at the same time he is proceeding on his mortgage in chancery, and after a foreclosure, may collect the deficiency at law." This is regarded by Chancellor Kent, (3 Johns. C. R. 431,) as the settled law, and referred to without disapprobation in *Haley, et al. v. Bennett*, 5 Por. R. 471, in which last named case it was held, that the recovery by the vendor of the possession of the land, does not annul the contract.

The question as to the right of the plaintiff below to recover damages for the detention of the land, is not presented by the record, though argued at the bar. To authorize this court to consider it, the question should have been raised in the court below, in the form of instructions to the jury, or otherwise. The instructions prayed for in the court below, not being in accordance with the views here presented, the court properly refused them. Let the judgment be affirmed.

WATSON, ET AL. LEGATEES, V. MCCLANAHAN, EX'R.

1. Objection cannot be made in the appellate court, to the allowance made to an executor, unless taken in the orphans' court, and the facts set out in the record.
2. An executor is entitled to a credit for payments made to a creditor of a legatee, by his direction.
3. The testatrix, by a writing under seal, acknowledged that she had received of the executor, the sum of two hundred dollars, and promised to pay it, if convenient, during her life, but if she should fail to pay it, she directs her executors, on the death of herself, and her brother John, to pay the same, with the addition of twenty *per cent. per annum*. By her will, she recites this promise, and directs it "to be paid according to its terms." Held, that the executor could retain this money, with interest at the rate of twenty *per cent. per annum*, to the time when from the condition of the estate, the executor was enabled to realize the money, as against a legatee; whether he could as against creditors, receive interest at the rate of twenty *per cent. per annum, quere*.

Writ of Error to the Orphans' Court of Shelby.

THE questions now presented to this court arose upon the final settlement of the accounts of the defendant with the orphans' court, and may be thus stated: 1. The intestate made and delivered to the defendant a writing in the following terms. "This day received from John M. McClanahan, two hundred dollars in cash, which I am to pay, if convenient, during my natural life, if not, I hereby on the death of myself, and on the death of my brother John, direct my executors, heirs or administrators, to pay the said John M. McClanahan, his heirs or representatives, the said sum of two hundred dollars, with twenty per cent. added thereon, value received. Witness my hand and seal. 9th March, 1841.

(Signed)

JANE WATSON, [seal.]"

The testatrix made her will of the same date, which was duly admitted to probate by the orphans' court of Shelby, which contains the following clause, among others: "I de-

sire that an obligation this day made by me, and bearing even date herewith, with conditions in it to John M. McClanahan, if not paid before the death of myself and brother John, be paid according to its terms." This will was admitted to probate in November, 1841, and the defendant was allowed on final settlement the sum of two hundred dollars advanced by him as stated, with interest thereon at the rate of twenty per cent. up to the first day of January, 1846, amounting in the aggregate to the sum of three hundred and ninety-two 22-100 dollars, although it was objected by Alexander Watson, a residuary legatee, that the transaction was usurious.

2. The defendant, as executor, received assets, and was accountable for twenty-five hundred and seventy-six 58-100 dollars assets—"the debts, disbursements and bequests" allowed him amount to the sum of thirteen hundred and ninety-nine 42-100 dollars, leaving "the sum of eleven hundred and seventy-seven 16-100 dollars to be divided between Alexander Watson and Delphy McCray, legatees of said estate." The defendant produced a receipt in full from Delphy McCray for her legacy, amounting to one half the last mentioned sum; which was received and admitted by the court as such.

Defendant also produced Alexander Watson's receipt \$491 38, his notes for \$18 91, and for \$4 23, a judgment in favor of the executor for \$25 75, and \$48 31, being part of the judgment in favor of Roper and McClanahan against Watson. These last mentioned debts were obtained by the defendant as executor, with the express understanding with Alexander Watson that they should be allowed as a payment of his legacy. The aggregate of all the sums mentioned in this paragraph amount to \$588 58, and were adjudged to satisfy the last named legatee in full.

The orphans' court made an allowance to the executor of \$247 65, but the record does not show what item or items compose this sum, though it is supposed to be intended as a compensation for services in settling the estate.

T. D. CLARKE, with whom was E. E. BRYSON, for plaintiffs in error, made the following points:

1. The transaction is usurious, no matter what shape or

disguise it assumes, where the capital is to be returned, a profit made or loss imposed upon the necessities of the borrower, and above the statute rate of interest reserved. *Ely v. McClung*, 4 Por. 128; *Lloyd v. Scott*, 4 Peters, 205. The contract reserving 20 per cent. is absolutely void, to the extent at least of the excess, both by common law and by statute. *Clay's Dig.* 589, § 1, 591, § 9; *Carlisle and Gragg v. Gray*, 10 Ala. R. 302, and cases there cited; *Comyn on Usury*, 62.

2. No subsequent act or device, however formal and solemn, or subtle, can give efficacy to a contract void in its creation on account of usury, and here the stipulation for 20 per cent. is absolutely void. *Solomon v. Jones*, *Const. Rep.* 144; *Moncure v. Dermot*, 13 Pet. 345; *Lloyd v. Scott*, *supra*; *Comyn on Usury*, 71; *Lowe v. Waller*, *Doug.* 740; *Trumbo v. Blizzard*, 6 Gill & J. 18. Usurious securities are void not only in the hands of the original parties, but in the hands of entire strangers to the transaction. *Comyn on Usury*, 64.

3. The plaintiffs in error may avail themselves of the usury. A privy in representation, blood, or estate, to the borrower, may take advantage of the usury, as the executor, heir, assignee in bankruptcy, even a creditor, bail to the action, though no party to the usury, alienee of a mortgagor, &c. in short, any person but a mere stranger, who has no legal interest, but officiously intermeddles. *Dix v. Van Wyck*, 2 Hill, 522; *Taylor v. U. Bank*, 3 A. K. Marsh. 239; *Jackson v. Dominick*, 14 Johns. 435; *Jackson v. Tuttle*, 9 Cow. 233; *Trumbo v. Blizzard*, 6 Gill & J. 18. Here the executor claims a sum for which there is no legal evidence, and the legatees have a right to contest the allowance, otherwise there would be no remedy. Where there is a right there is a remedy. The defendant in error is a creditor, not a legatee—he cannot be both, as their positions and rights are different and distinct. The will directs a debt to be paid, does not give a legacy; but if a legatee, there is error, because—

4. The will and bequest was a device to evade the statute of usury, and was induced by the unconscionable bargain imposed upon the necessities of the borrower. *Plumbe v. Cater*, *Cowp.* 116, 793, 112; *Lloyd v. Scott*, *supra*. The

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bequest was but a confirmation of the illegal contract, and the other legatees, as shown above, may avoid it. McClanahan would stand as another pecuniary legatee, and would have no advantage over them or other creditors under the will. 1 Roper on Legacies, 288; Coppin v. Coppin, 2 P. Wms. 292-6.

5. The twenty per cent. could only be recovered to the time of the death of testatrix, and no interest at all on legacy for twelve or eighteen months afterwards. A legacy does not bear interest until twelve or eighteen months after death, and if it does, but eight per cent. could be recovered. Man v. McCullough, 6 Por. 507; Ire v. Golding, 5 Binn. 472; King v. Deikle, 9 S. & R. 409; Mills v. Boyden, 3 Pick. 213.

6. The allowance of \$247 to the executor as such, (there being another allowance for annual services,) was exorbitant and illegal. It was error for the court to go into a settlement of the accounts between Alexander Watson and executor. The notice was to settle the estate. Watson in a proper court may have successfully resisted a recovery of the claims due McClanahan.

PECK, contra.

The plaintiffs in error cannot set up the usury in this case, even if the contract is obnoxious to that objection, because usury is a personal privilege for the benefit of the borrower, which he may waive, and if he does, no one else can take advantage of it. Cook & Kornegay v. Dyer, 3 Ala. R. 643. Here the testatrix, by her will, recognizes the agreement between herself and the defendant in error, and expressly directs it to be carried into effect. If in this case the estate had been insolvent, and consequently insufficient to have paid the \$200 mentioned in the agreement, with the 20 per cent., and all the other creditors of the testator, then, it may be, the creditors might have effectually resisted the payment of the 20 per cent., but certainly a legatee whose only claim is under the will, cannot object that the testator had not the right to direct this agreement to be carried into effect.

COLLIER, C. J.—In Powell, et al. v. Powell, 10 Ala. R.

900, it is said, "the allowance of compensation to executors and administrators to a reasonable extent, is warranted by constant practice, and it ought not to be refused, except in cases of wilful default or gross negligence, by which loss to the estate has been the consequence. Nothing of that kind is made to appear in this case, and therefore commissions were properly allowed." In *Steele v. Knox*, Id. 608, it was held that objections to the account filed by an administrator, may be made at the final settlement since the passage of the act of 1843; and "it is not necessary they should be in writing, but if either party wishes to have the decision of the court thereon reviewed, it will be necessary to spread them out upon the record, together with the decision of the court upon them." No exception seems to have been taken in the case at bar to the items of the executor's account which are supposed to embrace a charge for services and commissions; nor are there any facts disclosed in the record which would warrant the inference that the allowance was unreasonable in amount, or in itself improper. We cannot then assume that the sum allowed is disproportioned to the services rendered, or that it was not shown to the court that the charge does not embrace an expenditure of money by the executor in collecting and taking care of the assets. In this posture of the case, there is nothing of which error in respect to this matter can be predicated in the decree of the orphans' court.

The foregoing remarks are perhaps not inapplicable to the objection that Alexander Watson's share of the testatrix's estate was permitted to be paid by claims which the executor had purchased against him. The decree affirms that these were obtained by the executor with the assent of Watson, and under an express agreement that they should be allowed as a payment. This we must take to be true, as there was no exception to the ruling of the court showing the reverse. If the money had been paid to the legatee himself, it is conceded that it would have been good, and we can conceive of no difference in principle where the payment is made to his creditor by his direction or consent. Such, it must be assumed, is the fact in the present case, and the credit was therefore properly allowed.

The only question which appears to have been litigated in the orphans' court is, whether the executor was entitled to twenty *per cent. per annum* upon the two hundred dollars lent by him to the testatrix. The testatrix, by a writing under seal, acknowledged that she had received of the executor the sum of two hundred dollars, and promised to pay it, if convenient, during her life, but if she should fail to pay it, she directs her executor, &c., on the death of herself and her brother John, to pay the same, with the addition of twenty *per cent. per annum* added. This is not an absolute undertaking to pay more than the legal rate of interest; for it is expressly stipulated, the borrower may discharge the debt by paying the sum advanced to her, and the additional sum is only demandable of her executors, &c., in the event of her death without returning the money. To constitute usury, it is said the obligation to pay more than the legal rate of interest, must be absolute on the face of the transaction. *Moore v. Hylton, et al.* 1 Dev. Eq. Rep. 429. So a contract to pay a larger sum at a future day, upon non-payment of the sum agreed upon a prior day, is not usurious; but the increased sum shall be considered as a penalty, against which a court of equity ought to relieve, upon compensation being made; and that compensation is legal interest, unless some specific damage is shown. *Winslow v. Dawson*, 1 Wash. Rep. 119; *Pollard v. Baylors, et al.* 6 Munf. Rep. 433. The question whether a contract is usurious or not, is to be decided with reference to the time when it was entered into; if it was then legal, it cannot be made usurious by subsequent events. *Id.*; *Thompson v. Jones*, 1 Stew. Rep. 556. The contract of the borrower in the present case was not for the unconditional payment of any rate of interest, but only contemplated the addition of twenty per cent. annually, if the sum borrowed was not returned in the lifetime of the borrower and her brother. The cases cited clearly indicate that the transaction was not usurious.

But conceding that if the obligation is alone looked to, it would constitute a case of usury, and the question then arises, whether the testatrix did not waive all objection to the performance of her contract founded on that ground, by the

clause of her will simultaneously made, in which she directs her executors, if the obligation is not paid before the death of herself and her brother John, to pay it "according to its terms." Whether it is competent for a party to diminish his estate to the prejudice of *bona fide* creditors by a direction in his will to pay usurious interest to one of whom he has borrowed money, is not the question before us. Alex. Watson does not interpose as a creditor, but merely as a legatee, and certainly does not occupy a more favorable position than the executor. He comes in only as a beneficiary of the testatrix's bounty, and the executor, if he cannot be regarded as a creditor, as it respects the interest, will not be less favored than a gratuitous legatee. In this view, the plaintiff in error cannot be heard to alledge usury in the transaction between the testatrix and her executor; for he was no party to it, nor does the mere fact that he is a legatee make him a *privy*, in the legal meaning of the term. It has been held that a contract is void for usury only as between the parties to it, or those who stand in the borrower's place as his representatives. *Jackson v. Henry*, 10 Johns. Rep. 185; *Fenno, et al. v. Sayre & Converse*, 3 Ala. R. 458. The obligor cannot set up usury in the contract between the obligee and his assignee. *Littell v. Hord*, Hard. Rep. 81. Nor can the purchaser of an equity avoid the mortgage because it is usurious. *Green v. Kemp*, 13 Mass. Rep. 515; *Bridge v. Hubbard*, 15 Id. 96. The statutes against usury were intended for the benefit of the borrower, and confer on him a personal privilege which he may waive; and if he waives the privilege, no one else can insist on the usury. *Cook & Kornegay v. Dyer*, 3 Ala. R. 643. These citations abundantly establish, that if the testatrix could have defeated the payment of her obligation, in whole or in part, for usury, it was competent for her to waive the defence, and a legatee under her will does not stand in a situation which entitles him to insist on it. He is not her representative—but merely a donee of what she has given to him. Her executor represents her; and in cases where a party dies intestate, an administrator is the representative as to the personality, and the heirs as to real estate.

The will directs the obligation to be paid "according to its terms;" that is, if it is not paid in the lifetime of the testatrix and her brother John, the payee shall receive the money lent by him, with the addition of twenty per cent. There is no limitation as to the time up to which the twenty per cent. shall be added, and according to the interpretation in analagous cases, it must be calculated to the time of payment. The interest could not cease upon the death of the testatrix, for the contract contemplates not only that event, but also the death of her brother. It does not appear from the record that this latter event has occurred; unless it can be inferred from the fact, that certain property which the executor was directed to keep together until the brother's death, has been sold, and the additional fact, that the testator filed his accounts in the orphans' court for settlement.

Conceding the death of the brother previous to the first day of January, 1846, and still there is nothing to show that the interest should not have been calculated down to that day. Perhaps the executor may not previously have realized of the estate a sufficient sum, after paying other demands entitled to a preference, to extinguish the debt in question. Upon this point the bill of exceptions is entirely silent, and we can make no intendment against the decree of the orphans' court. If it had been shown that the executor was in funds, which he could have applied to pay himself before the 1st of January, 1846, from that time the interest should have ceased. In the condition of the record, it cannot be affirmed that there is error in the decree; and it is therefore affirmed.

HAYGOOD v. HARRIS.

1. A judgment against a female *dum sola*, but no execution issued thereon until after her marriage, creates no *lien* whatever on her property, and constitutes no impediment, to the levy of an execution on the property, upon a judgment obtained against the husband and wife.

Writ of Error to the Circuit Court of Lowndes. Before the Hon. E. Pickens.

THIS was a trial of the right of property, levied on by an execution in favor of Harris, and claimed by Haygood. On the trial, a bill of exceptions was sealed by the presiding Judge, which shows, that before Harris, the plaintiff in execution obtained the judgment, and execution, under which he sought to condemn the slave in this case, he had obtained judgment and execution against the wife of the defendant in execution alone, and which had been levied on the same slave, and claimed by the present claimant. A trial was had and the property condemned. The cause was carried to the supreme court, and was reversed and remanded, and that claim dismissed at this term, before this cause was called. Whilst said proceedings were pending, the junior execution in this case was levied on this slave, which is the same levied on by the previous execution—the parties are the same, and the debt the same on which both executions issued, the only difference being, that in the former case, the wife of Haygood alone was the defendant, and in this case, Haygood and wife are defendants in the execution.

Upon this evidence, the claimant requested the court to charge the jury, that the property in controversy could not be levied upon by the execution in this case, because it had been previously levied on by the older execution, against the wife of Haygood, and claimed by the present claimant,

which was pending at the time the levy in this case was made.

The court refused to give this charge, and charged, that the property might be levied on, and condemned under this execution, notwithstanding the levy of the older execution.

To the refusal to charge as requested, and to the charge given, the plaintiff in error excepted.

GILCHRIST, for the plaintiff in error, relied on *Hagan v. Lucas*, 10 Peters' Rep. 400, and 6 Ala. R. 45.

COOK, for the defendant in error, cited *Langdon v. Brumby*, 7 Ala. 55, and the decision of this court upon this case at a previous term, 10 Ala. 291.

DARGAN, J.—The question seems to be settled in this court, that if a junior execution be levied on goods, and they are claimed, and bond is given to try the right of property, yet an execution which has created an older lien on the goods, may be levied on the same goods. See *Langdon v. Brumby*, Adm'r, 7 Ala. Rep. 55. And the question does not depend on the date of the execution, but on the lien created by it. The case referred to is fully considered by the court, and the case of *Rives & Owen v. Wellborn*, 6 Ala. R. 45, is reviewed and approved. In the case from 6 Ala. R. it is held, that if the levy is made by virtue of the elder lien, and a claim is interposed, then the levy of an execution that creates a junior lien, cannot be made. Under these two authorities, the only question is, was the lien of the execution against Haygood and wife older than the lien created by the execution against the wife of Haygood only? Or, did the execution against the wife of Haygood create any lien whatever—or was it void? If the judgment was rendered against the wife of Haygood after her marriage, and the older execution issued thereon against her, or if the judgment was rendered against her before her marriage, and the execution issued after, the execution could create no lien on her property; for by the marriage all her personal property in possession, was vested in her husband, and the debt became

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the debt of the husband, and no proceeding at law could be taken to enforce it against her alone. See 10 Ala. R. 292. The bill of exceptions does not distinctly show us, when the judgment was rendered against Mrs. Haygood, nor when the execution issued thereon; but the language is, the plaintiff had a judgment and execution for the same debt against the wife of Haygood alone. The rule is, that the language in a bill of exceptions is to be taken most strongly against the party excepting, and under this rule of construction, we cannot determine that the judgment was rendered against Mrs. Haygood *dum sola*, and that the execution thereon was issued before the marriage; but must infer, that the execution issued, and was levied on the slave, after her marriage with Haygood. This being the case, the execution could create no lien upon her property whatever—she could have none at law, hence it follows, that the execution against her creating no *lien*, could form no impediment to the levy of the execution against Haygood and his wife.

The case referred to, of Hagan v. Lucas, 10 Peters, 400, is not in point. That case was decided, not on the question of lien, but on the question of jurisdiction. The court say, that a most injurious conflict of jurisdiction would arise, if goods seized by final process, from a State court, could be taken from the possession of the sheriff, by virtue of process from the federal courts. This decision is not inconsistent with the cases referred to. Here no conflict of jurisdiction can arise; the final process in both cases is in the hands of the same officer, and the only question is, which writ has created the eldest lien? and when this is ascertained, we can enforce this lien, notwithstanding a junior execution has been levied on the property, by the same officer. It results from this view, that there is no error in the record, and the judgment is affirmed.

ROBERTS v. TRAWICK.

1. In a contest about the validity of a will, the declarations of an executor having no interest under the will, cannot be given in evidence.
2. When a will is propounded to the orphans' court for probate, and is there contested, the admissions, or declarations, by one of several legatees of the unsoundness of the testator's mind, or that fraud, or undue influence was practised upon, or exercised over him, cannot be received to invalidate the will, to the prejudice of the other legatees.
3. If at the time of making a will, a testator is of sound mind, proof that twelve years before he had made a will, making a different disposition of his property, is irrelevant.
4. The declarations of the testator, made before, and at the time of the execution of the will, or so shortly thereafter as to form a part of the *res gestae*, and necessarily connected with it, may be received, to prove fraud or undue influence, in its execution.
5. Where a witness will receive a greater share of the estate by defeating the will, than he would take under it, he is incompetent from interest to testify against its validity.
6. Proof that one named as an executor in the will, refused to take upon him its execution, is wholly irrelevant.
7. Upon a question of sanity, opinions of the capacity of the testator can only be given, when preceded by the facts, or circumstances, upon which they are based; and can only be given by those whose long intimacy, and familiar and frequent intercourse with the deceased, qualifies them peculiarly to detect any mental alienation.
8. Testimony conducing to prove the unnatural character of the will, is admissible—as, that it deprived the most unfortunate of the testator's children of any participation in his bounty—or, that the testator was old, was in feeble health, of weak mind, or was prejudiced by his wife against his children.
9. An executor offering a will for probate, cannot take a non-suit.

Error to the Orphans' Court of Tuscaloosa county.

THIS was a proceeding had in the orphans' court of Tuscaloosa county, to try the validity of a will, which the plaintiff in error offered for probate, as the last will and testament of Nathaniel Davis, deceased. Citations were issued to the widow and heirs of the deceased; six of the latter contested

the will. The case was submitted to a jury, and a final trial was had on the 28th August, 1847, when the jury returned a verdict in favor of the contestants. Thereupon the court adjudged the said instrument not to be the last will and testament of the deceased, and gave judgment for the costs against the said Roberts. By the will, the testator, after providing for his funeral expenses, bequeaths to his wife, Elizabeth Davis, all his ready money, household and kitchen furniture, and a negro girl, Harriet, and her future increase, to be disposed of at her pleasure. Also, three boys, Charles, Jacob and Logan, and after her death or widowhood, bequeaths Charles to Willis Davis; Jacob to Richard Davis; and Logan to Oliver P. Davis, three sons of testator. He further gives to his said wife full possession of all his lands and plantation, farming tools, &c. &c., with three head of farm horses of her choice; a negro boy, Tillman, and negro woman, Fillis, and her future increase, during her natural life, or widowhood, and after her death, said last named property to be sold on a credit of twelve months, at public sale, and the proceeds equally divided between his three sons, Willis, Richard and Oliver P. Davis. He then proceeds to give to Arthur Davis, his son, of Georgia, five dollars. To his daughter, Nelly Trawick, wife of Hugh Trawick, twenty-five dollars. To his daughter Malinda Ray, wife of Duncay Ray, the sum of \$25. To Palatine Rice, another daughter, and wife of Jephtha Rice, the sum of \$25. To his daughter, Margaret Middleton, wife of Benjamin Middleton, \$25. To his daughter, Sarah Stanley, wife of Daniel Stanley \$25. All of which sums are to be paid out of the proceeds of the sales of his perishable property. The balance of his property he desires to be sold, and he bequeathed the residue, after the payment of his debts, to his three sons, Willis, Richard, and Oliver. The will appoints James W. Roberts, the plaintiff in error, and John Freeman executors, and bears date the 22d September, 1846. Upon the trial, several bills of exceptions were sealed, from which it appears, that the said executor, the plaintiff in error, introduced, and proved by the subscribing witnesses, the formal execution of the will, in their presence, by the testator. That in their opinion, the mind of the testator, at the time of its execution

was good for a man of his age, he being between seventy-five and eighty years old. That he had nine children, five daughters and four sons. That at the time of the execution of said will by him, he appeared to act without restraint, or influence of any person, and that he did it cheerfully. One of said subscribing witnesses was asked by the contestants, on cross-examination, to state the pecuniary condition of the daughters of the deceased. Plaintiff in error objected, but his objection was overruled, and the witness was allowed to state that the daughters were poor, except Mrs. Trawick, who was only in moderate circumstances.

The court permitted one Whitson to testify, against the objection of the plaintiff in error, that some twelve years past, said deceased made a will, to which he was a subscribing witness; that since this contest commenced, he being summoned as a witness, Mrs. Elizabeth Davis, the widow of the deceased, asked him, witness, what he knew about the will, and upon his speaking of the old will, she (alluding to a rumor which said the old will had been found) told Whitson, the witness, he had better mind how he swore about that will, for she had burned it in that fire-place, pointing towards the hearth. Whitson was then permitted, notwithstanding plaintiff's objection, to state the contents of the old will, which, as well as he remembered, made an equal division of the property among all the children except one, for which exception testator gave witness a reason, the portion given to his daughters being limited to them and the heirs of their bodies.

Contestants further proved, by one A. C. Trawick, son of one of the contestants, that the deceased told him, after the will purports to have been executed, that it was a fair and equal will, and that the statement that the will only gave \$25 to each of the daughters, was false. This proof was objected to by plaintiff in error, and his objection was overruled by the court.

Contestants then proved, against plaintiff's objection, that the said Freeman, named in the will as one of the executors, refused to act as executor of the will.

They next proved, (the plaintiff excepting,) by one Prewitt, that Roberts, the executor, told him that he did not

think they would break the will, but that it might be broken if they knew how to get at it. The contestants offered John Willingham as a witness; the plaintiff objected to his competency, as it appeared he was the brother of Mrs. Davis, the widow of the deceased, she having departed this life intestate, since the death of her husband, leaving no children. The court held the witness competent, and he testified that in a conversation with the testator, a short time before he made the will offered for probate, he said to witness, "John, all some folks talk about is a will, a will, a will, but the laws of Alabama make a will good enough for me." The admission of this proof was also objected to by plaintiff in error. Said Willingham was further permitted to testify, against plaintiff's objection, that soon after testator's death, Mrs. Davis, the widow, having heard that the plaintiff in error and Willis Davis had been to see witness, sent for him and asked him what said Roberts and Willis Davis had been to see him about—that he replied, "they came to talk with me about what they should do with your money," alluding to the money left her by the will. That Mrs. Davis said, "What have they to do with my money?" Witness replied, "Roberts is executor to the will." Mrs. Davis said, "He the executor! Roberts states falsely—he is not executor. The will appoints no executor. The old man would not have trusted him for five dollars."

The contestants offered to prove by the deposition of Nancy Willingham, that Mrs. Davis, the widow, a short time after the death of testator, said to her, that she did not intend to break the will of Nathaniel Davis, for it was made just as she wanted it to be made. Witness observed, there had been a previous will, by which the old man Davis nearly equally divided his property among his children. Mrs. Davis replied, "Yes, and I laid it in the fire." This proof was objected to by the plaintiff in error, but allowed by the court.

It was further urged as an objection to the competency of Willingham, that he would take a larger interest under the statute of distributions, than he would under the will. The only witness who testified on this point stated, that making a single guess, the estate, exclusive of the debts due from it, was worth something like twenty-five thousand dollars. The

orphans' court regarded this as too uncertain an interest to exclude the witness, but ruled that it went to his credibility only.

Contestants were allowed to prove by one Nancy G. Freeman, against plaintiff's objection, that she, the witness, passed by the house of the testator in September before testator died, (which was in January, 1848,) and she inquired of Mrs. Davis, his wife, how he was. She replied, that he was out of his senses on Thursday before the inquiry, and that she had sent for Roberts and made his will, and that he was not much better at the time of the conversation. Witness inquired of Mrs. D. who were the witnesses to the will. She replied that Monday evening was the time when the will was to be witnessed. To the admission of this as testimony, Roberts excepted. The contestants offered the deposition of one James Middleton, which was objected to by plaintiff, but allowed. He proves that about the middle of December, 1846, he had a conversation with Roberts, the executor, concerning the will. Roberts informed him that he wrote it. That it was not true, as reported, that deceased had only willed his daughters twenty-five dollars each. Said the old man, Davis, had made a pretty equal division of his property among all his children, &c. The plaintiff in error, upon a rebutting examination of a witness, after having proved two or three facts by him, for the purpose of showing the soundness of the testator's mind, asked him to state his opinion as to the soundness, or unsoundness of the mind of deceased. This proof was excluded by the court, and the witness was confined to a statement of the facts.

Plaintiff in error offered one Griffin as a witness, who was objected to on the ground of interest, it appearing that he had married and had children by a sister of Mrs. Davis, the widow of testator and legatee under the will—Mrs. Davis having died without issue, and her said sister being now alive. This witness was excluded. The court also refused to permit said witness to prove that his wife would get a larger portion under the statute of distributions than under the will. Plaintiff offered to pay Griffin the amount to which he was entitled under the will, which the court refused. He then offered to prove to the court, in order to remove the ob-

jection to Griffin's testimony, the value of the property of the estate, and of that which testator had advanced to his children, and which might be brought into *hotch-pot*. The court declined to hear this proof, unless it should be accompanied with proof of the amount of debts due from said estate, or by some means show what would be the amount for distribution after settling up the estate.

The plaintiff offered a deposition of another witness, Harriet McFarland, who testified to a conversation she had with Mrs. Davis in October, 1846, in which she (Mrs. D.) said she would be glad if Mrs. Ray, the daughter of testator, was as well provided for as the boys; that she had been a dutiful child. This conversation related to the will. At the same time, she saw and conversed with said Nathaniel Davis. She saw no foolish act, nor heard any foolish expression. That Mrs. Davis did not control him more than was common in the relation of husband and wife. That she believed he was of as active mind as any man of his age. This deposition was excluded, upon the motion of contestants.

The plaintiff offered the deposition of Rebecca Appling, in which she deposes to a conversation which she had with the testator some four years before, in which he declared that two of the contestants, Trawick and Rice, should not have one cent of his property. That there was one way to prevent it, and he intended to do it. Says she "frequently visited the house some four years since—was intimate in the family, and does not think Mrs. Davis controlled deceased. That he was a man who acted pretty much as he pleased about his affairs." The contestants objected to that portion of the deposition, which speaks of the witness's opinion as to the control of Mrs. Davis over her husband, and the habit of the testator in acting as he pleased, &c. The court sustained the objection, and excluded that part of the deposition.

Plaintiff offered the deposition of Susan Willingham, in which she details a conversation between herself, Mrs. Roberts and Mrs. Davis, at the residence of deceased, which took place the week preceding 25th December, 1846. Mrs. Davis said, (speaking of the will,) "things are not as she wished to have them, but she could not have her way. That she had

been well acquainted with testator for many years, and saw no change in his manner or mind, and that he seemed at the time of this conversation to be as clear-minded as he ever had been since her acquaintance with him, but he was very weak and feeble from sickness. The court ruled out, against plaintiff's objection, so much of the deposition as relates to conversations with Mrs. Davis, and witness's opinion as to the condition of decedent's mind.

After the proof had all been introduced except one witness, on the part of plaintiff in error, he proposed to take a non-suit, and take the case for revision to the supreme court. This the court refused to permit, and the plaintiff excepted.

After the jury had retired, they returned and asked of the court further instructions as to the statements proved to have been made by the plaintiff, Roberts. The court charged them, if Roberts had stated that the will gave to each of the daughters more than five dollars, this was an unfair statement, and that they might infer from this that he was guilty of other unfairness; but that they should take the whole testimony together, and give it such weight as they thought it was entitled to. This charge was not excepted to until after the jury had returned their verdict.

The plaintiff in error, having excepted to the various decisions of the orphans' court, in the rejection of the proof offered by him, and in admitting the proof objected to by him, assigns the same for error in this court.

PORTER & BRODIE, with whom was S. D. MOORE, for the plaintiff in error.

The court erred in admitting proof of the following matters:

1. The pecuniary condition of the testator's daughters. Jackson v. Betts, 9 Cowen, 208.

2. That testator made a will twelve years ago. Davis and wife v. Vancleve, (3 Pet. Dig. 704) 4 Wash. C. C. Rep. 262.

3. Mrs. Davis's declaration in regard to destruction of old will; also her declaration that Roberts was not executor; also that testator was not of sane mind one day about four months before he died; also that this will was made just as

she wanted it. *Mima Queen v. Hepburn*, (2 Pet. Dig. 225) 7 Cranch, 290; *Boyd v. Ely*, 8 Watts, 66; *Bovard v. Wallace*, 4 Serg. & R. 499; *Nussear v. Arnold*, 13 Id. 323.

4. Contents of the old will, when its destruction had not been proven. 18 Pick. 379.

5. Declarations of Roberts, the executor, in regard to the will. *Morgan v. Patrick & Smith*, 7 Ala. R. 185; *Copeland, et al. use, v. Clark*, 2 Id. 388; *Chisolm, use, &c. v. Newton, et al.* 1 Id. 371.

6. That the other executor had refused to act; such testimony being irrelevant, and even if it was not, this is not the best evidence the fact admitted of.

7. The court erred in allowing John Willingham to testify, as he was seeking to set aside the will, if he succeeded in doing which, he would get a larger share of testator's property than would come to him should the will stand.

8. The court erred in admitting proof of the declaration of testator, made some time before the making of this will, as stated by John Willingham. *Jackson v. Kniffen*, 2 J. R. 31; *Smith v. Fenner*, (3 U. S. Dig. 685,) 1 Gallis. 170; *Davis v. Vancleve*, 4 Wash. C. C. R. 262.

9. The court should have allowed an opinion of the strength of mind of the testator, based upon facts, especially that of witnesses so well qualified to judge as Poe and Mrs. Appling. *Massey v. Walker*, 10 Ala. R. 290; *Bowling v. Bowling*, 8 Ala. R. 541; *Rambler v. Tryon*, 7 Serg. & R. 90, (3 U. S. Dig. 683.)

10. Griffin was a competent witness, as he would take more under the statute of distributions than he would under the will; at any rate the court could not determine he was testifying in his own favor.

11. A release of this witness's interest would have rendered him competent even had he before been incompetent. *Hall v. Alexander*, 9 Ala. Rep. 221; and 16 Serg. & Rawle, 198.

12. If Mrs. Davis's declarations were admissible when offered by contestants, they were also admissible for executor, especially when she takes less under the will than she would under the statute of distributions. The court struck out these declarations from Mrs. Appling's deposition.

13. The court erred in rejecting some of plaintiff's depositions and admitting other parts of the depositions of defendants, as disclosed by the bill of exceptions.

14. The court erred in its charge to the jury.

15. The court should have allowed a non-suit as plaintiff desired. Stat. of 1845-6.

E. W. PECK, contra.

The plaintiff in error, claiming to be the executor of the last will and testament of Nathaniel Davis, deceased, presented a paper purporting to be the last will and testament of said deceased, for probate in the orphans' court of Tuscaloosa.

The defendants in error, claiming to be heirs at law, &c. of said deceased, resisted the probate of said paper as the last will and testament of said deceased, and insisted that the same had been obtained fraudulently and by the use of undue influence.

The deceased was an old man, approaching eighty years of age. Had been twice married. By his first wife he had nine children, four sons and five daughters. By his second wife, who survived him, he had no children.

Deceased left a handsome estate, all of which, except nominal legacies, was given to his wife and three of his sons, two of whom had married nieces of the second wife.

The plaintiff in error, who had also married a niece of the old woman, wrote the will, and proved its execution, and by it is made executor.

During the progress of the trial, a bill of exceptions was sealed by the judge, which shows some twenty odd objections made by the plaintiff in error, and ruled against him by the court, and the errors assigned present them all here for the consideration of this court.

The most prominent of these objections may be thus classified: 1. Declarations of the plaintiff in error, offered by the defendants to show that the will was fraudulently and unduly obtained, were admitted against his objection. 2. The declarations of the wife, offered and admitted for the same purpose, though objected to.

1. The declarations of the plaintiff in error were evidence in favor of the defendant, (1 Phil. Ev. 69.) because he was

the adverse party on the record, and liable for the costs in the event the will was rejected. 1 Phil. Ev. 90; 1 Greenl. Ev. § 171, 174; *Atkins v. Sawyer, et al.* 1 Pick. 192; *Davis v. Calvert*, 5 Gill & Johnson, 269, a strong case.

2. The declarations of the wife were evidence against the plaintiff in error, because, though not named as a party on the record, yet she was a party really interested in the suit. 1 Phil. Ev. 90, 91, 92, 93, and cases referred to; 1 Greenleaf Ev. § 690; look at 8 Greenl. Rep. *Ware v. Ware*, 42; *Miller v. Miller*, 8 Serg. & R. 267; *Davis v. Calvert*, 5 Gill & John. 269; 1 Mass. 71; 4 S. & R. 499; 13 Id. 323, 328, 329.

3. John Willingham was a competent witness for the defendant, because he was called against his interest. His sister, Mrs. Davis, was a principal devisee and legatee under the pretended will, who being dead without children, the witness was interested to establish the will—if established, he would be entitled to a distributive share of the legacies bequeathed to her. *Sims, v. Killen*, 12 Ala. Rep. 497. For the like reasons Griffin was incompetent as a witness for the plaintiff, to show the validity of the will.

4. The extreme old age of the deceased, connected with the unnatural character of the will, were properly admitted to induce the belief that the will had been improperly obtained; and the poverty of the daughters was competent to show the unnatural character of the will. *Clarke v. Fisher*, 1 Paige Ch. Rep. 171. There was no error, therefore, in admitting evidence of the needy circumstances of the daughters. For the same purpose it was competent to show that the deceased, in the vigor of his life, had made a different will, by which just and equitable provisions were made for those who were cut off by the second will.

5. The evidence of John Willingham was competent, consisting of the declarations of the deceased, made shortly before the pretended will, to show that undue importunity was being used to obtain the same, and that at that time, he did not intend to make a will, but to leave his property to descend and be distributed under the statute. *Rambler, et al. v. Tryon, et al.* 7 S. & R. 93; 2 Pirtle's Dig. 535, § 95; 2 J. J. Marsh. 242-3; *Miller v. Miller*, 3 S. & R. 269. The remainder of his evidence was proper to show that Roberts

had deceived not only the deceased, but his wife also; and taken in connection with other evidence in the cause, it was competent to show there had been a combination between Roberts and the old woman to impose upon the old man, in the matter of his will. This other evidence in part, is, that the old woman had destroyed the first will, and that the last one was made just as she wanted it. Now connect these two facts with the evidence of Mrs. Nancy G. Freeman, that the old woman had sent for the plaintiff when the deceased was very feeble, and also in a very doubtful state as to sanity, and made his will, and I think the mind will be strongly drawn to the conclusion, that the will was improperly obtained.

6. The rebutting evidence offered and rejected, needs only to be read, to see that the court was right in rejecting it. It consisted of the declarations of Mrs. Davis,—the mere opinions of witnesses, and conversations that were wholly irrelevant and improper to be received.

7. The motion of the plaintiff to submit to a non-suit for the purpose of bringing the case to this court under the act of the last legislature was properly overruled, because it was not a case embraced by the act.

8. The charge of the court, excepted to after the jury had delivered their verdict, cannot be considered here. The objection was made too late.

CHILTON, J.—This was a proceeding under the 9th section of the act of 1821, in the orphans' court, to try the validity of the will of Nathaniel Davis, late of Tuscaloosa county, deceased. The act under which it was instituted, provides, "when the validity of any will shall be contested, or doubts shall arise as to its validity, or as to any fact, which, in the opinion of the judge, it may be necessary to have ascertained by a jury, before awarding any order, judgment or decree, such judge, at any stated session, or on any sitting held in vacation, according to the provisions of this act, may forthwith cause a jury to be summoned and impaneled, to try such issues, or inquire of such facts, as under his direction shall be submitted to their decision, and shall cause them to be sworn in such form, as the case may re-

quire. Clay's Dig. 304, § 35. By the first section of the act of 1823, a mode is pointed out for selecting the jury. As no formal pleading was had in the orphans' court, setting forth the particular grounds upon which said will was contested, we must regard the case as presenting every issue, which, if found for contestants, would render the will invalid, and which the proof conduces to establish. The counsel for the contestants in this court, insist, that although the deceased had sufficient mind to make a will, (and which the bill of exceptions shows, was admitted in argument on the trial in the orphans' court,) yet the proof offered and received was legitimate as conducing to show, that the deceased, laboring under the physical and mental imbecility which were the result of his extreme old age, was an easy prey to the artifices of a second wife, by whom he had no children, and that he was induced by her importunity, and the exercise of an undue influence over him, to make a will, excluding from its provisions, the most unfortunate members of his family, and greatly beneficial to her; and to show that the will made an unsuitable and unnatural disposition of his property, and contravened his previously expressed determination.

Without considering each exception to the testimony separately, we propose to deduce the general rules of evidence as applicable to them; that by refusing the exceptions to the will, we may with less propriety ascertain what testimony the court should have received, and what rejected.

1. What acts and declarations of an executor may be received in evidence to impeach or sustain the will, in a controversy to which he is a party? The rule contended for by the counsel for the plaintiff, that the declarations of the executor, who is the mere nominal plaintiff, may be given in evidence, although sanctioned by some of the authorities referred to, has been repudiated in this State. In the case of *Head, &c. v. Shearer, et al.* 9 Ala. Rep. 791, in which this court review its former decisions on this point, it is held "that an admission of a nominal plaintiff, after he has parted with his interest in the note, cannot be given in evidence to defeat the beneficial plaintiff." *Copeland and Lane v. Clarke*, 2 Ala. Rep. 388; *Chisolm v. Newton & Wyley*, 1 Ala. Rep. 371; *Brown v. Foster*, 4 Ib. 282.

The same doctrine received an examination by this court in the case of *Graham v. Lockhart*, 8 Ala. Rep. 26. In that case, it was attempted to give in evidence the declarations of a trustee in a trust deed to impeach the deed; the circuit court rejected the evidence, and this court affirmed the judgment. The contrary rule, recognized by the English courts, that the admissions of the plaintiff on the record are always evidence, although he be but a trustee for another, has, by the uniform decisions of this court, been departed from. It is held both in England and in this country, that he cannot release the action. *Payne v. Rogers*, 1 Doug. 407; 1 Salk. 260; *Isaacs v. Boyd*, 5 Por. Rep. 388; *Roden v. Murphy*, 10 Ala. R. 804. It would seem absurd to say the trustee could by his admissions destroy a right of action which he could not release, and thus effect by indirection what he could not directly accomplish. The executor, having no interest under the will, is but the agent to execute, not to defeat, its provisions, and to allow his admissions to prejudice the rights of the legatees, would not only be unjust, but disastrous in its consequences. It follows that the orphans' court committed an error in allowing the declarations of *Roberts*, the executor, to be given in evidence against his objection. *Horn v. Whittier*, 6 N. Hamp. Rep. 88; 5 Ib. 268.

We might here close this opinion, but as the case will be sent back for another trial, it becomes important for us to declare the law as applicable to the other points raised in the record, as a guide for the orphans' court in its future action in the cause.

2. The next question presented for our consideration by the bill of exceptions is, whether the orphans' court properly allowed the declarations of *Mrs. Davis*, the widow of the supposed testator, and principal devisee in the will, to go to the jury. It is insisted by the counsel for the defendants in error, that her declarations are evidence, because, though she is not a party of record to the suit, yet she is a party really in interest. Upon a careful examination of the authorities referred to by the counsel, we do not think they sustain this position. In *Phelps, et al. v. Hartwell, et al.* 1 Mass. R. 71, it was proposed to prove that one of the principal de-

visees, and who was also executor, had expressed his opinion, that the testator, at the time of making his will, was not of sound mind. Dana, C. J., and Strong and Thacher, Justices, were against admitting the evidence offered. The majority of the court seem, however, to lay some stress upon the fact, that the declaration offered amounted only to an *opinion*, and that the facts upon which it was based, were not declared.

In Miller, et al. v. Miller, 3 Serg. & R. 267, the defendants offered evidence to prove, that one of the plaintiffs in the issue, and who was a devisee under the will, had, after its execution, "by various discourses, *intimated*, that he had procured the will to be made, that the same was read to him, and that he had given the reasons why his brothers and sisters had gotten so small a portion." This evidence was rejected by the register's court, and the question was presented upon the appeal, whether the declarations of one devisee were evidence against the other devisees. The court declined deciding this question, and sustain the rejection of the proof upon the ground that it was vague, indefinite, and immaterial. The same question arose in Bovard and wife v. Wallace, et al. 4 Sergt. & R. 499. The defendants offered to prove, that one of the devisees had *declared*, that the testator, at the time of making his will, was incapable of making a valid disposition of his property. The court rejected the proof upon the authority of Miller v. Miller. The question however is again presented to the same court, Nussear v. Arnold, 13 Sergt. & R. 323. In this case one Margaret King was the principal devisee in the will, which gave her the whole estate (except a few legacies to a small amount) for life; after death one half was to go to her relatives, and the other half to the relatives of the testator. The defendants offered to prove her declarations, "that the testator, at the time of making his will, was incapable of transacting business." The court (Tilghman, C. J.) say, "it is a case, *sui generis*, where the rights of several persons are tried together, and where, so far as concerns personal estate, the law admits of no other mode of trial. Under these circumstances, it is unsafe and unjust to admit the rights of one to

be affected by the declarations of another, and therefore the evidence ought not to have been admitted."

In Maryland, it is held, that declarations adverse to a will, made by an executor, who was defendant upon the record, and a contingent devisee respecting every interest under the will, are competent evidence to go to the jury. See *Davis v. Calvert*, 5 Gill & Johns. 270. This decision is founded on the rule, so generally recognized by the English courts, that Mr. Justice Lawrence, (in *Bauerman v. Radenius*, 7 T. 663,) says he could find no case opposed to it, "that the admissions of a party on record are always evidence, though he be but a trustee for another"—a doctrine which this court has, for substantial reasons, heretofore repudiated. See *Graham v. Lockhart*, 8 Ala. R. 9.

I have looked into our reports, and have been unable to find any decision directly upon the point here presented. We have then to make a precedent which will hereafter govern us in our adjudication of similar cases; and in view of the authorities which we have been enabled to examine, and the reasoning upon which they are predicated, we feel safe in declaring the correct rule to be, that when a will is propounded to the orphans' court for probate, and is there contested, the admissions, or declarations, by one of several legatees of the unsoundness of the testator's mind, or that fraud, imposition, or undue influence was practised upon, or exercised over him, shall not be received to invalidate the will to the prejudice of the other legatees. *Dan v. Brown*, 4 Cow. Rep. 483.

3. We cannot perceive upon what principle the witness, Whitson, was permitted to give evidence of a will executed by the testator some twelve years anterior to the one in controversy, by which it is said the testator made an equal division of his property among his children. Neither party to this controversy claimed the old will as valid; and if it be granted, as it was admitted in the argument, that the testator, at the time of the execution of the last will, was possessed of sufficient mind to make a valid disposition of his property, all former wills are expressly revoked by the execution of this. If a will be made in conformity to a fixed determination entertained and expressed for years, this, it is

held, is strong proof of capacity. *Couch, et al. v. Couch*, 7 Ala. R. 519. But as every sane man has a right to change his opinion, and to disregard the claims of his children, however needy or meritorious, and to will his property even to a stranger, we do not consider the insulated fact of his having twelve years previously made a different disposition of his property, as at all affecting the validity of his last will. See *Stephens and wife v. Vancleve*, 4 Wash. C. C. Rep. 262. We think the proof was irrelevant, and calculated to mislead the jury, and should therefore have been excluded. But if it were permissible to read the old will in evidence, parol proof of its contents, predicated upon the admissions of one of the legatees of its loss or destruction, is not allowable. *Brown v. Betts*, 9 Cow. R. 208; 18 Pick. 379; 1 Ala. Rep. 602.

4. As to admitting the declarations of the testator to defeat his will, we find some conflict of authority. But we think the true rule laid down in the case of *Smith v. Fener*, 1 Gal. R. 170, where it is held, that the declarations of the testator, made before and at the time of the execution of the will, or so shortly thereafter as to form a part of the *res gestae*, and necessarily connected with it, may be received to prove fraud or undue influence in its execution. See *Stephens and wife v. Vancleve*, 4 Wash. C. C. Rep. 263; *Jackson v. Kniffin*, 2 Johns. R. 31; 1 Ves. 440; 2 P. Wms. 136; *Rambler v. Tryon*, 7 Sergt. & R. 90.

5. The court erred also in refusing to hear proof as to the interest of the witness, Griffin. The interest of a witness, most usually ascertained upon an examination of the witness himself, upon his *voire dire*, may be shown, or a presumptive interest disproved by proof *aliunde*. If, in the present case, the witness, Willingham, would receive a greater share of the estate by defeating the will, than he would under it, he is clearly an interested witness—his interest would preponderate in favor of the person offering him, and his proof would be rejected. We do not decide whether the witness was or was not interested, as the facts are not before us—we can only assert the proposition of law, that it was the duty of the court to have heard the proof as to his interest which was offered and rejected. The ground of its rejection was,

that the proof could not be allowed, "unless the party could also show the amount of debt against the estate, or by some other means, show what would be the amount for distribution after settling up the estate." The proof offered was pertinent to the question of interest, and as the court could not judicially have known that the estate owed debts which were unpaid, the failure to prove a negative, that it did *not* owe, was not a legitimate ground for its exclusion. *Harrel v. Floyd and wife*, 3 Ala. R. 16.

6. The proof of the refusal of one of the executors named in the will to take upon him its execution, is wholly foreign from the issues before the jury, and was clearly irrelevant. What influence such proof could have, we cannot easily conceive, but as it was insisted on, and allowed at the risk of an exception by the plaintiff, we are not to presume that it was without its effect.

7. As to the opinions of the witnesses, sought to be elicited on both sides of this controversy, respecting the capacity of the testator, and the influence and control exercised over him by Mrs. Davis, his wife, were the matter *res integra*, I should be inclined, both from the weight of authority, and considerations of sound policy, to exclude the whole of them. It cannot have escaped the observation of the profession, that conclusions of this sort, especially when formed by those whose avocations do not peculiarly fit them for judging, though never so honestly formed, are most unsafe guides for the ascertainment of truth. It is however settled, that where the question of insanity is involved, the general rule which allows witnesses only to relate facts, circumstances, or a series of declarations which evince unsoundness of mind, allows of exceptions "arising out of some peculiar relation or connection of the witness, with the person whose sanity is questioned." See the cases collected in *Bowling v. Bowling*, Ex'r, 8 Ala. R. 538. Also, the *State v. Brinyea*, 5 Ib. 243; 2 *Cowen & Hill's Notes*, Phil. on Ev. 759, note 529. What class of witnesses come within this peculiar relation, so as to make their opinion, founded on the facts, legitimate testimony, is not so well settled. In *Rambler v. Tryon*, 7 Sergt. & R. 90, the witness, whose opinion was received, had known the testator intimately from childhood until his death. With-

out, however, entering upon an examination of the authorities, or presuming to lay down a rule as applicable to all cases which may arise, we think, that to render the opinions of witnesses in such cases—those who are not physicians, nor skilled as to the *indicia* of insanity—legal evidence, such opinions should be preceded by the facts or circumstances upon which they are based, and should only be given by those whose long intimacy, and familiar and frequent intercourse with the deceased, peculiarly enable them to observe any mental aberration on his part.

8. The only remaining ground of objection to testimony is, that the orphans' court permitted the contestants to prove the pecuniary condition of testator's daughters. In *Jackson v. Betts*, 9 Cow. 208, it was held, that the situation of any of the testator's children, or grand children, as to property, and the comparative inadequacy or inequality of a provision for them in his will, are inadmissible to show an express or implied revocation. It is often most difficult to determine what connection an isolated fact may have upon the issues until the whole proof is submitted. Standing alone, it may prove nothing, but connected with various other facts and circumstances, it may form a strong link in the testimony. No competent means of ascertaining the truth ought to be rejected. The court, we think, should have admitted all testimony conducing to show the unnatural character of the will in controversy; that it deprived the most unfortunate of the testator's family from any participation in his bounty, is a circumstance which, in connection with other circumstances, was proper to go to the jury. One question was, whether the wife of the testator had exercised such undue influence over his mind, as to take away his freedom in the execution of his will. To establish this, it was competent for the contestants, in connection with proof of acts, or efforts on her part to induce its execution in a particular way, to show that the testator was old—was in feeble health—of weak mind—was unduly prejudiced by his wife against his children, and that his will is not such as a man influenced by the ordinary feelings which prompt us to provide for our offspring, would have made. On the other hand, it was competent to show, that he had cause for rejecting the claims

of his children—or, that the influence exercised by the wife was but the ascendancy which her virtues gained over him. For, to deny the legitimate exercise of such influence, would be to rob virtue of her reward. *Small v. Small*, 4 Greenl. 220.

9. We are satisfied that the court acted properly in refusing to permit the plaintiff in error to take a non-suit. This is not one of the description of cases contemplated in the statute of 4th Feb. 1846. See pamph. Acts of 1845-6, p. 35. The court, by statute, is required to proceed with the investigation, and to determine the matters put in issue—and if the executor refuse to produce the will, he is liable to process of attachment. *Clay's Dig.* 304, *et seq.*

Let the judgment of the orphans' court be reversed and the cause remanded, that a *venire de novo* may be awarded.

MAY, ET AL. V. ROBERTSON.

1. When the sureties of a constable, suffer him to act under a bond to which their names have been signed without objection, the jury is authorized to infer a waiver by them of any previous demand of additional sureties, before it was to be binding on them, and their consent to be bound by it as it stands.

Writ of Error to the Circuit Court of Talladega. Before the Hon. S. Chapman.

THIS suit was commenced by motion before a justice of the peace, by Robertson against May as a constable, and against Coker, Best and Spence as his official sureties. The default alledged, is the failure to return a certain writ of execution described in the notice. After judgment against

them, the defendants appealed to the circuit court, where they pleaded as follows:

1. Coker, Best and Spence denied all the allegations of the motion. 2. Best and Spence asserted that when the execution was placed in May's hands, he was directed to return it or retain it, at his discretion. 3. By all the sureties, that the bond was delivered to one Cotton, clerk of the county court, with the distinct agreement that the same was an *escrow*, and to become valid as a deed only upon condition that one Curry and one Elston should execute it as sureties also; that Curry and Elston never signed the same, so it is not the deed, &c. At the trial, the defendants asked to be allowed to withdraw all defence as to Coker, and to file separate pleas for Best and Spence, in all respects similar to those previously pleaded. The court refused, and held the defendants to the issues already made. The plaintiff then proved that the execution was not returned until the 20th December, 1845—its return day being the 22d September, 1845. That May acted as constable from the date of the bond aforementioned, and lived in the same beat with Best, and within a few miles from Spence and Coker, and that the signatures of all the sureties to the bond were genuine. The bond is dated the 22d April, 1844, and purports to bind May, Coker, Best and Spence, for the performance by May of the duties of constable, and is approved by the judge of the county court.

The evidence for the defendants tended to show the parties signed the bond as an *escrow*, and left it with the county clerk, to be operative on condition that Elston and Curry should execute it as co-sureties; but the clerk did not communicate this to the judge of the county court. Elston and Coker did not execute the bond, but the clerk handed it with other bonds to the judge for his approval, and he approved it. In the summer of 1844 or 1845, Best came to the clerk's office and asked the clerk if Elston and Curry had signed the bond, and objected to being bound by it without their signatures. No other persons were present than Best and the clerk. It also appeared in evidence, that in 1845 the justice issuing the execution held his court monthly, on the fourth

Saturday of each month, in pursuance of an act approved 5th February, 1840. Said execution was not returnable to any of the monthly terms. The defendants objected to the execution as void, but the court allowed it to be read to the jury. On this state of proof the court charged the jury—

1. That although the execution was not returnable to the regular monthly term of the court, and therefore was irregular, yet the constable can take no advantage of it—that he was bound to return it according to its mandate—that the defendant in the execution might have moved to quash it, but the officer had no such right, nor had he any to disregard it.

2. That although the bond was originally delivered as an *escrow*, yet if the sureties subsequently supposed May to act under the bond, it authorized the inference they had waived their demand of additional sureties, and had consented to be bound by it as it stood. It would be a fraud on the public to permit them to lie by for such a length of time, and suffer him to act without objection on a bond which the public had no means of knowing was deficient. That it was their duty to make their objection to the judge of the county court, or in such mode as would warn the public that May was acting without a valid bond, and that such objection made to the clerk of the county court would not avail them, the public not knowing of the objection.

The defendants excepted to the several rulings of the court, and they are now assigned as error.

MORGAN, for the plaintiff in error, insisted—1. The execution, by the act of 1840, (acts, 137) is void, and therefore the constable was in no default in not returning it. *Holloway v. Johnson*, 7 Ala. Rep. 660.

2. The defendant Coker had the right at any time to withdraw his defence, and the other parties should have been allowed to plead anew.

S. F. RICE, for the defendant in error, cited the previous decision of this case, 11 Ala. 466.

COLLIER, C. J.—We cannot perceive that the defend-

ants could have been prejudiced by the refusal to permit one of them to withdraw his pleas. But conceding that one of several defendants has the right to abandon his defence, it is clear that an application for the others to replead is a matter within the discretion of the court; and its refusal is not reversible on error.

The act of 1840 "relative to justices' courts, and for other purposes, in certain counties therein named," enacts that the courts of justices of the peace in Talladega and other counties, shall be holden regularly once a month, and at no other time, except to hear and determine rules against constables. *Further*, that all processes issued by a justice of the peace, which is not returnable to some superior court of law or equity, shall be returnable at a regular term of holding the justice's court; "otherwise the same shall be utterly void: nevertheless, should any suit be instituted in any of said courts within five days preceding the time of holding said court, the same shall be made returnable to the second term of the court after the issuance thereof."

It is also provided by the act that justices' courts and constables' sales shall be held at the muster ground in the several beats, unless there is no building, or from other cause it is manifestly inconvenient; in such case the justices and constable may designate some other place within the beat, which may be most proper. And constables' sales shall be holden at the time and place of holding justices' courts in the beat, unless the property levied on be of such a description as makes its removal inconvenient. Pamp. acts of 1839 and '40, p. 137.

The statute of 1814, directs justices of the peace to issue execution against the person or goods and chattels of the party against whom judgment is so entered, for the debt and costs, or costs alone, returnable at a certain time and place therein mentioned, not less than twenty, nor more than thirty days from the time of issuing the same. Clay's Dig. 358, § 1. By the act of 1822, it is provided that justices of the peace may issue executions to any county in the State against the property of a defendant in a judgment, which shall be returnable to the justice issuing it "within any period of

time, not less than thirty, nor more than ninety days." Id. 207, § 32, 33.

The words "all processes" are sufficiently comprehensive to embrace not only *original* but *final process*; and such would be their interpretation, if they were not controlled or limited by the subject matter, or the connection in which they are found. In excepting process returnable to a superior court from the generality of the enactment, nothing could have been intended but attachments, or some other initiatory or ancillary process; and the *proviso*, that a suit instituted within five days preceding a justice's court, shall be returnable to the second term after its institution, though perhaps not conclusive of the intention of the legislature, is certainly persuasive to show that it did not propose to interfere with the issuing and return of executions. But if the terms employed be doubtful, a strong argument may be drawn from the inconvenience of the thing. If an execution is called for but a day previous to the sitting of the court, it must be returnable to the first term; and this although it is desired to be issued to a distant county, if the act of 1840 embraces executions. Such a regulation would often result in a loss to the plaintiff, and give to the defendant a license to remove his property where it could not be made available for the payment of his debts. This view brings us to the conclusion, that it is still allowable for justices of the peace to pursue the acts of 1814 and 1822 in framing executions, at least as it respects the time of their return.

We have seen that it was proved that May acted as a constable in Talladega from the date of the bond in question—lived in the same beat with Best, and in a few miles of Spence and Coker. The genuineness of the signatures of all the parties who appear to have executed the bond being proved, there was a sufficient foundation on which to rest the second charge. This point was so ruled when this cause was here at a previous term. 11 Ala. Rep. 466. The judgment of the circuit court is therefore affirmed.

KIDD V. PORTER, ADM'R.

1. The orphans' court has no power to allow an administrator, to apply the share of a distributee, to debts he claims to be due him from such distributee, unless the distributee consents to it.

Writ of Error to the County Court of Sumter.

THE defendant in error, was appointed administrator of Frances D. Wiggins, deceased, by the orphans' court of Sumter. He returned no inventory of the estate, and in June, 1844, made application for a final settlement. The court ordered forty days' notice to be given to all persons interested in the estate, and set the 17th of August thereafter as the day on which the application would be heard, and a final settlement made. The defendant in error then filed his account with said estate in court, which is as follows: "I have nothing which is of the estate. Shortly after letters were issued, I sent a special agent to Mobile, to search for the property; but the two grandmothers, Mrs. Kidd and Mrs. Wiggins, as I learned, (it being represented that there were no debts,) agreed to divide the estate. A *pro forma* settlement was made with the guardian, and each received the property allotted, except a sum of money going to Mrs. Kidd, which I have received, and applied to her use, in private account between us. I have nothing, therefore, to charge myself with as administrator.

Compensation and expenses of a special agent to

Mobile, on business of the estate	\$100 00
Fees paid clerk of Sumter court	8 56
Fees of settlement	22 75

\$133 97

Which was sworn to.

The record further shows, that on the day appointed for

the final settlement, no one appeared to contest the settlement, the account was allowed, and the administrator and his sureties discharged. After this Mrs. Kidd, the grandmother of the decedent, petitioned the orphans' court to be made a party to said decree, on final settlement, setting forth that she was one of the distributees of Frances D. Wiggins, deceased. The petition was granted, after notice to Benjamin F. Porter; and by the decree of the orphans' court, the petitioner was made a party to the decree of final settlement, and being thus a party, sues out a writ of error; and here assigns for error, that the court erred as shown by the decree of settlement.

HOYT, for plaintiff in error.

BRODIE, contra.

DARGAN, J.—It is the duty of an administrator, to show by an inventory, the assets that have come to his hands. The defendant in error, by his account rendered for final settlement, shows, that he has received money, which was of the estate of his intestate, and which he states belonged to a particular distributee, Mrs. Kidd, and which he has applied to her use, in private account with himself. But how much he has received is not shown, nor does he exhibit the accounts to which he has applied it; and the decree of final settlement sanctions this, and permits him, without the consent of Mrs. Kidd, to retain the amount, whatever it may be, without exhibiting how much he has received, or the debts to which it has been applied.

The orphans' court has no jurisdiction, to allow an administrator to apply the distributive share of a distributee, to debts he claims to be due him, from such distributee, unless the distributee should consent that the administrator might do so. *Watson v. Watson's executor*, at this term. No such consent is pretended in this case. Mrs. Kidd, as one of the distributees, by petition is made a party to the decree, and as such can sue out a writ of error, and assigns errors thereon. The cause, therefore, is properly before this court, and as the

orphans' court had not the jurisdiction to permit the defendant in error, under the circumstances shown on the final settlement, to retain the money that came to his hands, in payment of debts owing from Mrs. Kidd to him, the decree of final settlement is reversed, and the cause remanded.

WEISSINGER, ET AL. V. JOHNNSON, ET AL.

1. When a cause is submitted for trial on bill and answer, and the defendant denies the equity of the bill, and avers that the same was filed for delay, damages of six *per centum*, upon the judgment at law enjoined by the bill may be decreed.

Error from the 12th Chancery District. Before the Hon. D. G. LIGON, chancellor.

COMPLAINANTS filed their bill praying relief against a judgment on a writ of error bond, upon which they became bound as sureties for one Child, to prosecute a cause in the supreme court. The bill prayed an injunction, which was granted, and the defendant having filed his answer, shortly after the injunction was granted, obtained an order before the chancellor in vacation, dissolving the injunction. On final trial, the cause being submitted upon bill and answer, the chancellor dismissed the bill and decreed damages at the rate of six per centum, to be added to the judgment at law. The decree as to the damages is assigned for error.

DAVIS, for plaintiff in error.

EVANS, contra.

CHILTON, J.—By the act of 1816, (Clay's Dig. 357, § 76,) it is provided that "whenever an injunction shall be

dissolved, damages after the rate of six per centum shall be added to the amount of the judgment, provided the court be of opinion that the injunction was obtained for delay. The act of 1843, gives to the chancellors in vacation, after the defendant had filed his answer, the power to dissolve injunctions, in the same manner as had previously been exercised by the court in term time. Clay's Dig. 158, § 82. In this case the injunction was dissolved in vacation, and the cause was afterwards submitted for final trial on the bill and answer alone.

In the case of Crawford v. Bank of Mobile, 5 Ala. R. 55, it is said the damages of six per cent. cannot be allowed unless the facts stated in the bill, are shown to be untrue or evasive, and consequently, when the bill was dismissed for want of equity, a decree allowing damages was reformed in this court; but the case before us is not in this predicament. The defendant has fully answered the bill, denied all the equity, if it contained any, and avers that the bill was filed for delay. We think the conclusion at which the chancellor arrived, that the bill was filed for delay, is warranted by the facts of the case.

Let the decree of the chancery court be affirmed, at the cost of the plaintiff in error.

STEWART v. CONNER.

1. An assignee of a judgment, which is afterwards reversed, and remanded by the supreme court for further proceedings, is an incompetent witness for the plaintiff, upon the ground of interest. A witness may be rejected for interest at any stage of the cause, when his interest is discovered.
2. When proof has been made, that a party admitted an account to be correct, the effect of the admission may be destroyed, or impaired, by proof, that it was hastily, or inconsiderately made, without a knowledge of the

facts; but it is not admissible to prove, that in the opinion of others, he is not a man of capacity, or education, to understand long accounts, and is rather dull.

Error to the Circuit Court of Pickens. Judgment rendered by his Honor Samuel Chapman.

ASSUMPSIT by the defendant, against the plaintiff in error.

The questions presented, arise out of a bill of exceptions. The plaintiff called a witness to the stand, and examined him without objection. On the next day, in the further progress of the trial, he was again called to the stand by the plaintiff to be examined, to another point of the cause, and defendant proposed to examine him first, as to his interest, which was objected to, because not made the day previous, and it was not stated that the facts had since come to the knowledge of the defendant. But the witness, who was of counsel for the plaintiff, stated, he had no objection to answering, and denied having any interest. He also stated, that after the recovery of a former judgment in this case, he with plaintiff's other counsel, took an assignment of a part of that judgment. That the judgment had been since reversed, and the cause remanded, but that he claimed nothing under the assignment. The court overruled the objection, that the defendant's objection came too late, but permitted the witness to be again examined for the plaintiff.

The defendant having introduced testimony, tending to prove, that the plaintiff had acknowledged the correctness of certain accounts, which the defendant, and one Jemison, executors of William Booker, and guardian of Edith N. Booker, had against the plaintiff, as executor of Sarah N. Booker, plaintiff's counsel then introduced witnesses to prove, that they were well acquainted with plaintiff, and that he was not a man of capacity, and education, to enable him to understand long accounts. That he was rather dull. The defendant objected to this testimony, but the court permitted it to go to the jury, and the defendant excepted, as also to the admission of the previous witness, upon the ground that he was interested. These matters are now assigned as error.

P. MARTIN and B. W. HUNTINGTON, for the plaintiff in error.

1. The plaintiff in error contends, that Stith was an incompetent witness, notwithstanding his opinion he was not interested. See *Delone v. Rhemer*, 4 Watts, 10; *Walker's Rep.* 131, 134; *Phillips's Ev.* —; *Carroll v. Pathkiller*, 3 P. 279.

2. A portion of the former judgment in the same case being assigned to him, gave him an interest to that amount in whatever might be recovered in this suit.

3. The witness only expected to be paid out of the judgment, which made his interest manifest.

4. The court erred in admitting testimony to prove that the plaintiff had not capacity and education to comprehend complicated accounts, and that he was *rather dull*. See 2 *Kent's Com.* 452; *Osmond v. Fitzroy & Co.* 3 P. Williams, 129; *Bennet v. Vade*, 2 Atk. Rep. 324; *Ball v. Manew*, 1 Dow's N. S. R. 380.

5. The testimony is peculiarly improper, as there was no fraud charged, or the correctness of the book of accounts made up by the auditor called in question. The witness only gave his opinion as to the *grade* of the plaintiff's intellect—he stated no *fact* for the inference of the jury. This was inadmissible. See *Tolman v. Alston*, 5 P. & S. 410; *Bullock v. Wilson*, 5 P. 338; 3 *Starkie Ev.* 1736; *P. & M. Bank v. Borland*, 5 A. R. 531.

E. W. PECK, for the defendant in error.

I.—1. The plaintiff in error undertook to show the interest of the witness by examining the witness.

2. The assignment spoken of is not shown to have been by deed. It is not shown to have been a joint assignment in favor of the witness and the other counsel.

3. It does not appear that the assignment extended further than to the judgment recovered at the time the assignment was made.

4. The assignment was not called for, that the court could determine its legal effect.

5. If by parol, it could be waived by parol, and the waiver was made in open court, and the assignment could not afterwards be set up by the party, even if otherwise it might in equity, have extended to a subsequently recovered judgment.

6. The objection therefore went to the credibility, and not the competency of the witness. 1 Greenl. Ev. 434, § 390.

II.—1. Verbal admissions are to be received with great caution, therefore are either strengthened or weakened by the extent of the witness's information, &c. 1 Greenleaf Ev. § 200.

2. Verbal admissions hastily made are of little force. 6 Wend. 277. Evidence that a person in poor health, and subject to depression of spirits, may be admitted to show that his statements, &c. are not entitled to the same consideration, as if made under a different state of feeling. Washburn's Dig. 345, § 8.

3. The force of admissions must depend upon the *circumstances* under which they were made. In many cases it will be evidence of the strongest kind, if clearly proved—in some cases they amount to but little. 1 Phillips's Ev. 107.

4. The force of admissions declines by gradual shades from the most express and solemn admissions, down to expressions and acts which afford but remote and weak presumptions. 2 Starkie's Ev. 37.

5. The case of Wood v. Brown was decided on different principles. In that case the settlement was sought to be avoided, by showing incompetency, &c. Here the evidence was offered, not to show that the admissions were void because the party was *non compos*, but to show the force of the admission, whether it afforded a strong or a weak presumption against the party.

COLLIER, C. J.—1. This cause was before this court at a previous term, but the points then considered are not decisive of either of the questions now presented. 9 Ala. Rep. 818. The competency of the witness, Stith, was rested by the circuit judge, upon the grounds that he had no interest in the result of the suit, which disqualified, and if he had, the objection to him came too late.

It was stated by the witness that he was one of the plaintiff's counsel, and supposing his client would have no other means of compensating his services, he took an assignment

from him of a part of the judgment which had been previously recovered in this suit, to secure himself and associate counsel the amount of their fees; that that judgment had been reversed, and he had or claimed nothing under the assignment. The opinion of a witness that he has no interest in the result of a cause, does not furnish a conclusive test of the fact. If it appears that he has misapprehended his rights, and that he will really be benefited, if the decision is favorable to the party for whom he is called to testify, he may be rejected, though he declares that he will not be affected by the determination. This is an established principle in the law of evidence, which neither party controverts. That the witness in the present case really believed that he had no disqualifying interest may be conceded, yet if the plaintiff made the assignment as he stated, the rights which it conferred were not entirely extinguished by the reversal of the judgment. In the absence of additional or explanatory proof, it is but a reasonable inference that the assignment was in writing and in usual form. This being so, the declaration of the witness that he was entitled to, or claimed nothing under it, could not operate as a release of the interest it transferred to him. An assignment of a judgment does not invest the assignee with the legal title to it, but merely authorizes him to coerce a collection by suing out execution in the plaintiff's name, and appropriating the proceeds to himself. It transfers merely an equitable interest, which attaches itself to the suit if the judgment is reversed, and still left pending for another trial; and if upon a subsequent trial the plaintiff is again successful, the assignment attaches in equity to the second judgment, and so on *toties quoties*. The witness then, though unconscious of it, had an interest in the plaintiff's recovery, and was consequently incompetent to testify for him. Phillips v. Thompson, 2 Johns. Ch. Rep. 418; Robertson v. Stewart, 5 Watts's Rep. 442; Hillhouse v. Smith, 5 Day's Rep. 432; 2 Phil. Ev. C. & H's Notes, 114 *et seq.*, and cases there cited.

It is said that there is hardly any restriction either as to the time or manner of raising objections to the competency of a witness; but if not made till after trial, they come too late. Sims v. Givan, 2 Blackf. Rep. 461. Ordinarily, at

whatever stage of the cause the witness is discovered to be interested, his testimony must be rejected. *Swift v. Dean*, 6 Johns. Rep. 523; *Fisher v. Willard*, 13 Mass. Rep. 379. An objection, if known, it is said, should not be delayed so long as to deprive the opposite party of the right to release or discharge the interest. 2 Phil. Ev. C. & H's Notes, 708, and cases there cited. Here, the objection to the witness was not made, until he was dismissed and called by the plaintiff a second time. What we have said will abundantly show that the question of the witness's competency was made in due season, and should have been sustained.

2. The opinion of a witness in general is not evidence—he must state facts. But on questions of science or trade, or others of a kindred character, persons of skill may speak not only as to facts, but are allowed also to give their opinions in evidence. 1 Phil. Ev. 290; 2 Id. 759, C. & H's Notes, and citations; *Gibson v. Williams*, 4 Wend. R. 320; 7 Verm. Rep. 161; *Morse v. The State*, 6 Conn. Rep. 9; *State v. De Wolf*, 8 Id. 93; *Kinne v. Kinne*, 9 Id. 102; *Law v. Scott*, 5 Har. & Johns. Rep. 438, and many decisions of this court. The statement of the plaintiff's witnesses, that they were well acquainted with him, “and that he was not a man of capacity and education to enable him to understand long accounts—that he was rather dull,” was nothing more than the opinion of the witnesses as to the grade of the plaintiff's intellect, and his education; and upon the principle stated was clearly inadmissible. If imbecility of mind could be shown, for the purpose of impairing or destroying the effect of an admission made by a party, the special facts of which such a conclusion could be predicated should be proved, and the jury should make the inference.

A most respectable elementary writer says: “If the party be absolutely deprived of the use of his understanding, or be deemed by law not to have attained a sufficient degree of mental power, there can be no *aggregatio mentium*, or mutual assent of minds; and consequently, no binding agreement. But the law *presumes* that there is a full capacity to contract. The instances in which protection is given from responsibility on agreements, on account of mental inability, form exceptions to the general rule; and must be strictly es-

tablished on the part of the promiser who claims exemption. It is only in the prescribed instances that protection can be claimed: and weakness of mind short of insanity; or immaturity of reason, where the party has attained full age; or the mere absence of experience or skill upon the particular subject of the contract in question, afford no ground for relief at law or in equity, if no actual fraud be practised on the party." Chitty on Con. 4 Am. ed. 107, 108. In *Farnam v. Brooks*, 9 Pick. Rep. 212, it was held that no degree of physical or mental imbecility which does not deprive one of legal competency to act, is of itself sufficient to avoid a contract or settlement with him. And in *Dodds v. Wilson*, 1 Const. Rep. 448, the court say a contract with a man of weak mind is binding, if no fraud or undue advantage is taken of his situation. See *Somes v. Skinner*, 16 Mass. Rep. 348, *et seq.*

In *Juzan, et al. v. Toulmin*, 9 Ala. Rep. 662-685, we said, "Mere weakness of intellect, if the party is *compos mentis*, does not deprive him of the capacity to contract; but imbecility of understanding constitutes a material ingredient in examining whether a bond or other contract has been obtained by fraud, or imposition, or undue influence; for although a contract made by a man of fair understanding may not be set aside, merely because it was a rash, improvident or hard bargain, yet if made with a person of imbecile mind, the inference naturally arises that it was obtained by circumvention or undue influence. 1 Story's Eq. 238 to 242. In *Blackford v. Christian*, 1 Knapp's Rep. 77, Lord Wynford said, a bargain into which a weak mind is drawn under the influence of deceit and falsehood, ought not to be held valid. And a degree of weakness of intellect far below that which would justify a jury, under a commission of lunacy, in finding him incapable of controlling his person and property, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed." So it has been held that there is no distinction between the capacity required to make different kinds of contracts—a legal capacity to make any contract, is a capacity to make all contracts. *Hale, et al. v. Brown*, 11 Ala. Rep. 87. This view of the law as it respects the effect of mental imbecility short of insanity,

in determining the validity of contracts, may furnish an analogy by which to test the admissibility of evidence as to the character of the plaintiff's intellect, and his education, to weaken or destroy his admission that the account, as stated by an auditor, was correct.

We think it clear that the evidence adduced was inadmissible. It was not shown that the plaintiff was overreached, or that he was induced by circumvention, or undue influence, to make the admission; nor was there any proof that the account was incorrectly stated to the plaintiff's prejudice. Such additional testimony would be indispensable to induce even a court of equity, which exercises a more enlarged and liberal jurisdiction, to accord any influence to imbecility of mind, as a ground of relief against an unconscionable contract. Mere weakness of understanding or defectiveness of education, cannot render inoperative, an act otherwise valid; it must be connected with other facts showing that it had been taken advantage of, so as to warrant the implication of fraud. This is the rule which we have seen is recognized in chancery. How far a court of law would go in affording relief in such cases, we need not consider, as it is clear that a more extended or liberal principle is not there acknowledged.

It may be conceded that all admissions are not alike potent as evidence, and that their effect may be impaired by showing that they were over-hastily or inconsiderately made without a knowledge of the facts. But this must be proved by legal evidence disclosing facts from which a jury may deduce a conclusion, and not by the opinions or conclusions of witnesses. None of the citations of the counsel for the defendant in error, not even that from the Vermont Reports, on which he most strongly relied, lay down the law more broadly.

On both the points considered, the circuit court misapprehended the law—its judgment is consequently reversed, and the cause remanded.

CARROLL AND WIFE v. BRUMBY, ADM'R.

1. A testator by his will declared, that certain of his slaves should be permitted to go to Africa, their passage to be paid, &c., but if they desired to remain subject to his daughter as they had been to him, they should be permitted to do so, but in no event to be sold, or deprived of this privilege either before or after the death of my said daughter. Should they, or any, or all, prefer not to emigrate, then and in that event, they shall in all respects be subject to my daughter, as they are to me—Held, that the slaves had not the legal capacity to choose between freedom and servitude, and that the bequest of freedom being void, the title to the slaves was vested in the daughter.

This was a proceeding in the orphans' court of Perry county, before his honor J. P. Graham, against A. V. Brumby, administrator with the will annexed of John F. Wallis.

The legatees under the will appeared, a decree of final settlement was rendered, ascertaining the amount of monies in his hands, and a judgment was rendered for each legatee, for his proportion of the amount, but this was insufficient to pay in full their legacies. The legatees objected, that the administrator should be charged with the hire of certain slaves that belonged to John F. Wallis, deceased, and the only question was, whether the slaves were specifically bequeathed by the will of the testator to his daughter, Ann Eliza, or whether they were liable to pay the legacies. By the first clause of the will of the testator, he devised to his daughter his real estate, stock, with the dividends and rents thereon accruing. The second clause is in the following language: In relation to my kind and faithful servants, Jane Harper and her children, George Washington, Maria and Alice, Millary and her two children, Jane and Millory, and Aaron, the husband of Maria, it is my will that they be permitted to go to Africa, their passage paid, and two years support allowed them after their arrival, out of any funds belonging to my estate, not otherwise appropriated. If however, my said servants prefer to remain subject to my said daughter, as they are to me, they may be permitted to do so,

but in no event shall they be sold, or deprived of their privilege, either before or after the death of my said daughter. It is further my will, that my executors buy, if practicable, Tilly and Kora, children of said Milly, which were sold by me, the first for a supposed fault, and the other at the request of the mother, and advice of friends. Said servants, when bought, are to be allowed to accompany to Africa those now in my possession, or to remain under the control of my daughter, as they shall prefer. Should they, or any, or all, prefer not to emigrate, then, and in that event, they shall in all respects be subject to my daughter, as they are to me, who is hereby admonished to treat them kindly, and to attend to their religious instruction. Should they however remain in servitude until the death of my daughter, they must be sent to what free colony my executors may consider most advantageous.

The daughter, Ann Eliza, is in life, and holds the said slaves under the will, as a specific legacy.

The orphans' court decreed, that the administrator was not chargeable with the hire of said slaves, and that he was authorized under the will to deliver them up to the daughter, and to revise this decree, the legatees sue out this writ of error.

DAVIS, for the plaintiff, cited Trotter v. Blocker and wife, 6 Porter, 269; 2 Wms. on Ex'rs, 739, 841, 973; Jeremy's Eq. 104, and 1 Roper Leg. 149.

HOPKINS, contra.

The slaves had no capacity to take the bequest of their freedom. Trotter, adm'r, v. Blocker and wife, 6 Porter's R. 269. In that case, the testator made no disposition of the slaves, in the event of their legal incapacity to enjoy the bequest he made in their favor. As the bequest of freedom was void, the property in the slaves was not disposed of by the will, and as to them the testator died intestate.

If the statute law, at the death of the testator, had recognized the bequest of freedom as a legal one, the slaves would be entitled to their freedom. 7 Ala. Rep. 795. In the event which has happened, the legal incapacity of the slaves to

take the bequest of their freedom, the property in them is disposed of by the will to the testator's daughter.

The testator did not intend to allow his slaves but two alternatives, to migrate to Africa, or remain in bondage to his daughter. He had no legal right to offer the first, and they no capacity to accept it; but he had the right to prescribe the second, the legal effect of which is equivalent to an absolute bequest of them to his daughter.

The effect of the legal restraint upon the will of the slaves which prevented them from determining to go to Africa, is the same as if they had possessed freedom of will upon the subject, and had decided not to go there. In the latter case, they would, under the will, be the slaves of the daughter of the testator.

According to the law of the land, they are slaves, and the intention of the testator appears clearly from his will, that as long as they might be slaves after his death, they should be the slaves of his daughter.

They were not capable of willing that they would migrate to Africa, because the law determined for them, that they should not go there. Being thus detained in bondage, it must be to the person in whose favor the testator directed, by his will, that their servitude should continue while they remained in this country.

The privilege granted to the slaves by the will to go to Africa, before the death of the daughter of the testator, is void, and has no effect upon the interest given in them by the will to the daughter, in the event the privilege should not be exercised. The privilege to migrate after the death is void also, and the property of the daughter and her heirs intended to be terminated by the exercise after her death of the privilege, cannot be affected by the void permission, as it cannot be exercised.

There is a valid bequest of the slaves in the will, to the testator's daughter, because his will shows his intention to dispose of all the property he had in the slaves, and to give to his daughter so much of the interest in them as they might not take under the bequest of freedom, and all the interest that could be derived from their servitude while it endured. He directs, in conformity to this intention, that while their

bondage continues, it shall be for the benefit of his daughter. *Cogbill v. Cogbill and others*, 2 Henn. & Munf. Rep. 466, 509.

As there is no legal limitation of their bondage, there is no limitation of the right of the daughter to hold them in servitude for her benefit.

If the daughter were entitled to a life estate only in the slaves, the bequest is a specific one, and the slaves would not be liable to be sold, nor the administrator to be charged with the hire, to which the daughter is entitled, for the payment of the pecuniary legacies.

DARGAN, J.—The plaintiffs contend that the testator intended a legacy to the slaves, to wit, their freedom—but as the laws of this State prohibit this, and they cannot take this legacy, or bequest, for want of legal capacity; that the testator died intestate as to his slaves, and therefore their services, and the slaves themselves, are liable to pay the legacies. If the hire of the slaves be assets for the payment of the legacies, then the slaves themselves would necessarily be so, and it is only necessary to inquire whether the slaves named in the will are subject to pay the legacies. It is certainly very clear that the testator never intended that the slaves named in his will should be sold for this purpose, for he forbids their being sold under any circumstances. It is true he did intend to give them the option of freedom or servitude, but they have not the legal capacity or power to choose—the law forbids this, (see 6th Porter, 269,) hence it is contended, that the testator died intestate as to them. But if we take the intention of the will for our guide—and this we can do when that intention does not contravene the law—we will find, that the testator intended, that if they remained in servitude, they should be subject to his daughter, as they had been to him. How had they been subject to him? They had been subject to him as his slaves. It was then his will, that they should be subject to his daughter in servitude, as her slaves. We can give effect to this intention of the will, but we could not give effect to the intention that the slaves should be free. But suppose the law would permit the slave to accept free-

dom or not, and in the event the slave refused the bequest, then the testator willed the slave to his daughter—and the slave refused the legacy, would not the right of the daughter be incontrovertible? A testator can surely give a legacy to one, and if such one refuse to accept, then over to another. In this case, the legatee (the slave) has not capacity to accept; the law binds him to servitude, and the gift, or legacy to the daughter ought not to fail, if the slave will not, or by law cannot, accept of his freedom. In either event, they should remain in servitude, subject to the daughter as they had been to the testator—for so is the will. And if they remain in servitude, subject to the daughter as they had been to the testator, then the administrator is not responsible for their hire, nor are the slaves liable to pay the legacies.

It results from this, that there is no error in the decree of the orphans' court, and it is consequently affirmed.

BARNEY v. EARLE, ET AL.

1. The chancellor may entertain a motion to dissolve an injunction, notwithstanding exceptions have been filed to the answer, which are not disposed of. But the defendant should have the benefit of all exceptions well taken, and the case should be considered as if they were sustained.
2. One who receives a bill, or negotiable note, before its maturity, in payment of a debt, is a *bona fide holder*, and is not affected by any force, or fraud in obtaining the bill, of which he had no notice.
3. Impertinent matter, which if stricken out would not affect the merits of the case, cannot be considered upon the inquiry, whether the chancellor properly dissolved the injunction.

Appeal from Marengo Chancery Court. Before the Hon. A. Crenshaw, Chancellor.

THE plaintiff in error filed his bill in the chancery court holden in the county of Marengo, against Joseph B. Earle, individually, and as executor of James W. Earle, deceased, also against Robert J. Ware, James Battle, John Battle and Samuel, merchants and partners, under the firm name of Rives, Battle & Co.; which bill, among other things, charges that on the 28th March, 1837, complainant formed a partnership with defendant (Earle,) by which it was agreed to carry on a farm upon joint account, in the county of Marengo, for 3 years; the complainant putting into the concern as stock, 58 negro slaves, estimated by the parties at \$52,000, and the said defendant (Earle) furnishing lands, described in a statement made at the time by said Earle, which is exhibited to the bill, and which were valued by the agreement of the parties at \$58,000. Each conveyed to the other, in the capital so put in, one moiety, and Barney executed to Earle his promissory note for the difference in the capital so advanced, being \$6,000. That complainant then resided in North Carolina, and after having completed the above arrangement, he returned home, leaving the slaves and farm under the control and management of the defendant, Earle. That Earle cultivated the farm in the years of 1837 and 1838, and when called on to account at the end of the latter year, reported that the expenses were equivalent to the profits of the farm. That complainant, fearing a loss from the arrangement, proposed a dissolution of the partnership, which Earle assented to, upon condition that he should retain the hands for the year 1839, and the parties mutually executed reconveyances, vesting the interest in the property as it originally stood. This done, complainant instructed his agent in Mobile to sell his said slaves on a credit of ten years, with interest from date, securing the purchase money by mortgage on the slaves and real estate. That the agent sold them to said Earle, and took a mortgage on the slaves, and the land formerly placed into the partnership by Earle. That Earle removed a portion of his own property to Texas, which excited complainant's alarm for the safety of his debt, and after various proposals on the part of Earle to sell out his equity of redemption to complainant, it was finally agreed, in the winter of 1841-2,

that the land should be sold under a decree of foreclosure, and that complainant should purchase it at said sale, and should execute his notes to Earle for the sum of \$22,000, payable in instalments of two, four, six and eight years. The complainant under this arrangement, obtained possession of the slaves, and executed his notes, which he left in the hands of his agent in Mobile, to be delivered over to Earle, after the sale under the decree, but being informed that there were judgments against Earle older than the mortgage, and for other reasons which the bill does not disclose, he withdrew from the agent his notes, and refused a compliance with the contract. It appears that Earle paid complainant at the end of the year 1839 the sum of \$4,000, and in the latter part of 1840, he paid him the sum of \$5,250, upon the demand so secured by mortgage. This sum, with six or eight mules, is charged to be all that complainant has received from said Earle. The bill further charges, that after many importunities on the part of Earle, to induce complainant to purchase his equity of redemption in said lands, which importuning was accompanied by false and fraudulent representations as to its quality and value—complainant, relying upon such representations, agreed to purchase said equity of redemption. That this agreement was forced from him by fears of the loss of his life from personal violence, which he was informed by a friend, who came to him to have the matter settled, the said Earle had threatened to inflict, if complainant should refuse to conclude such purchase. Induced by such considerations, the bill charges, complainant agreed to give \$15,000 for the equity of redemption, payable in three annual instalments, and executed his notes to divers persons for this sum; one of the notes, amounting to \$5,000, was made payable to James W. Earle, the son of the defendant, Joseph B. That said James W. indorsed it in blank, and it was delivered to Robert J. Ware, of Montgomery, as collateral security for a pre-existing debt, who indorsed the same to Rives, Battle & Co. as collateral also. The note is payable and negotiable at bank, and was passed off before due. This note was put in suit in the circuit court of Marengo county, in the name of Battle & Co., and to enjoin which suit the bill in part is filed. Complainant charges the note is without consideration, and that

Ware and Rives, Battle & Co. were fully apprised, before the note was passed to them, of all the circumstances under which it had been obtained.

That since complainant had purchased said equity of redemption, Earle had pointed out a portion of the land to be sold under execution, and to protect his title, complainant had been compelled to purchase it in at the sum of \$1,000. That said Earle, on the sale of the equity of redemption, executed to complainant a deed with warranty as to title. That he has paid all of the \$15,000, except the \$5,000 now in suit.

Complainant offers to cancel this last arrangement, and to convey the slaves and land to Earle upon his paying the sum of \$50,000, which he had agreed to pay, and for which he executed the mortgage, and refunding the \$10,000 paid by complainant under the last purchase, complainant accounting for the hire of slaves, &c.

The circuit judge made a *fiat* granting the injunction.

All the defendants answer the bill; the answer of the firm of Rives, Battle & Co. is sworn to by one member only. Various exceptions are filed to the respective answers, and pending the exceptions, the defendants moved the chancellor in vacation to dissolve the injunction. This motion was granted by the chancellor, from which interlocutory decree, under the statute of this State, the complainant has appealed to this court. The matter of the exceptions and answers will sufficiently appear in the opinion.

BYRD, for plaintiff in error, made the following points:

1. The answer does not deny the equities of the bill. 3 Ala. R. 448; 2 Story, 243.
2. The chancellor erred in passing upon the exceptions in vacation. Clay's Dig. 354, § 55, 358, § 82.
3. The chancellor erred in dissolving the injunction before the exceptions were passed upon by the register. Clay's Dig. 354, § 55.
4. The exceptions were well taken, and the chancellor erred in overruling them. Mitford, 315.
5. The chancellor erred in dissolving the injunction on

the answer of Ware, and Rives, Battle & Co., the exceptions to the answer of Earle being well taken.

F. S. LYON, contra.

The complainant excepted below to the answer of Rives, Battle & Co. 1. Upon the ground that the same was not signed by a solicitor of the court, but was signed by one of the respondents.

2. That the answer of Rives, Battle & Co. was not sworn to by all the members of the firm, but by one only, and excepted to the answer of Ware upon the ground that it contained scandalous and impertinent matter, and excepted to the answer of Earle for the reasons stated in the record.

As to the first exception to the answer of Rives, Battle & Co., by the 29th section of the declaration of rights, every person has the right to prosecute or defend a civil cause by himself or counsel. The answer was signed by one of the firm, a party in interest, and was therefore sufficient.

As to the second objection to the answer of Rives, Battle & Co., the bill does not seek a discovery from each member of the firm, but charges that the note in controversy was negotiated to Rives, Battle & Co. without consideration, and with a knowledge that it was obtained by fraud and duress. The answer of the firm is therefore joint, and was sworn to by one of its members, and was sufficient. See *Reynolds v. Dothard*, 11 Ala. R. 531.

The objection to the answer of Ware is not sustained by the record. The exceptions to the answer of Earle were immaterial, if the answers of Rives, Battle & Co. and of Ware were sufficient to dissolve the injunction. They deny every material allegation in the bill, and show complainant's promise to them to pay the note in question after its transfer. See answers.

An injunction may be dissolved upon the answer of such defendants as may have a knowledge of the facts charged in a bill, although there are other defendants who have not answered. *Dunlap v. Clements, et al.* 7 Ala. R. 539.

The note in controversy was upon its face negotiable and payable at bank, and was transferred to respondents before its maturity, and in the course of trade for a valuable considera-

tion, and hence the defence alledged in the bill was not available as against the holders. See *Emanuel v. Atwood*, 6 Porter, 384.

If the equity of a bill is denied by the answer, exceptions for impertinence will not prevent a dissolution. 1 Barbour's Ch. Pr. 642.

CHILTON, J.—The questions which are presented for our consideration are—

1. Can the Chancellor entertain a motion to dissolve the injunction upon the coming in of the answers, if exceptions to such answers put in issue their sufficiency, and which are undisposed of?

By the act of 1841, (Clay's Dig. 354, § 55,) it is provided, that "exceptions to bills, answers, and reports, shall be heard and determined by the register, in the first instance, but subject to an appeal to the chancellor." By a subsequent act, passed in 1843, the chancellors have power, within their respective divisions, to hear applications in vacation, for the dissolution of injunctions, to be made after answer filed, upon ten days notice to the opposite party. Clay's Dig. 358, § 82. Before the passage of the latter act, the registers; whose duty it was to hear and determine exceptions to answers, &c., had likewise the power to dissolve injunctions, but by the first section of this act, the power to grant and dissolve injunctions, is taken away from the registers, and the chancellors invested with the power to dissolve in the same manner as if the application had been made in court.

We feel warranted in saying, that a correct interpretation of these statutes does not deny to the chancellor the power to hear a motion to dissolve, notwithstanding exceptions may have been filed to the answers. He is not in the first instance to hear the exceptions, but whether exceptions are filed or not, he is, upon such motion, equally bound to look into the answers, and to determine whether they deny the equities of the bill. If they do, he is bound, regardless of the exceptions, to dissolve. The statute conferring upon the register the power to hear exceptions, was intended merely for the relief of the court, which too frequently was embarrassed by the consideration of collateral matters involv-

ing an examination of the file, and with which the register was supposed to be conversant. It does not restrict the power of the chancellor over the injunction. It is however proper in such cases, to give the defendant the benefit of all exceptions well taken to the answer, and to consider it as though they had been sustained. If, allowing the exceptions, the answers still deny all the equity of complainant's bill, the injunction should be dissolved; and in cases where a discovery is sought, which defendants fail to make, and which if made in conformity with the allegations of the bill, would influence the court in its action upon the injunction, the court should, for the purposes of the motion, regard such allegations as confessed. But in no event could the pendency of exceptions oppose an objection to dissolving the injunction, unless they affect the answer in points relating to the ground of the injunction, and if the exceptions are frivolous, they will furnish no objection to a motion to dissolve. See 1 Barb. Ch. Pr. 642; Hop. Ch. Rep. 276; Ross v. Smith, cited 1 Hoff. Pr. 357, n. 1.

The note upon which the suit at law has been instituted, being payable and negotiable in bank, is placed by our statute upon a footing with bills of exchange. The defendant, Ware, in answer to the direct allegation of the bill, which avers he acquired it as collateral security for a pre-existing debt, avers that he acquired it long before it was due, in the regular course of trade, and for a valuable consideration, viz: in payment of a debt due from J. B. Earle to him. He also states that Rives, Battle & Co. have no interest in the note, but are merely his agents to collect the same. He further denies all notice of any fraud or force, by threats or otherwise, in obtaining the note. Besides, he appends to his answer a copy of a letter written by the plaintiff in error to him, dated 28th December, 1845, by which he fully acknowledged the justness of the demand, and asked indulgence until he could raise funds out of the sale of his cotton, to adjust it. Having received the bill, or note, in payment of a debt, Ware is to be regarded a *bona fide* holder without notice, and the inquiry, in this aspect of the case, so far as concerns him, whether the bill was obtained by fraud or force from Barney, the plaintiff, is wholly immaterial—he is bound to pay it to

the *bona fide* holder. 2 Kent's Com. 79, 80; Story on Bills, § 188, 192, and authorities there cited. Allowing therefore all that the complainant states in his bill, as against Earle, to be admitted, it can have no effect as against Ware, and it follows that the exceptions filed to Earle's answer cannot prejudice Ware's right to dissolve the injunction. The answer of James W. M. Battle, for the firm of Rives, Battle & Co. is in effect but a disclaimer of all interest in the note and subject matter of the suit, which may as well be made by one as by all the partners. Reynolds v. Dothard, 11 Ala. R. 531.

There are but two exceptions filed to the answer of Ware, one is for impertinence in this, that he answers, "if complainant had been defrauded by Joseph B. Earle, in obtaining the note, he ought to have discovered the same between the 25th March, 1842, the date of his note, and the 28th December, 1845, the date of his letter promising to pay the same to this defendant, and if he was in duress at the time of the date of said note, his fears must have been greatly excited, to have continued from March, 1842, to December, 1845." The second exception, for the same cause, (impertinence,) is, that in his answer he states, "he regards the bill filed by the complainant, as a dishonest attempt to evade the payment of a debt justly due."

Neither of these exceptions, if well taken, (and we are not called upon to express any opinion as to whether they should be sustained,) affects the merits of the case upon which the injunction rests. If the supposed exceptionable parts of the answer were stricken out, the case would stand precisely where it now does. We think, therefore, the decree of the chancellor, dissolving the injunction, was correct, and it is consequently affirmed.

DARGAN, J., did not sit in this cause.

CAMP v. FORREST AND ANOTHER.

1. The judgment in an action of trespass to try title, has no greater effect, as a bar to another action for the same land, than a judgment in ejectment.
2. A sale of land by one in possession, is not void at common law, because an action is then pending for the land against the vendor.

Writ of Error to the Circuit Court of Jefferson. Before the Hon. J. D. Phelan.

THIS was an action of trespass to try titles to a lot situated in the town of Elyton. The cause was tried on the plea of "not guilty," a verdict returned for the defendants, and judgment rendered accordingly. From a bill of exceptions sealed at the plaintiff's instance, it appears that the premises were sold by the sheriff of Jefferson, on the first Monday in June, 1840, under an execution issued on a judgment against Jonathan Steele—at that sale Jonathan B. Badger became the purchaser, and received the sheriff's deed. Plaintiff then introduced and proved a deed from Badger to himself.

Defendant admitted he was in possession of the premises when this action was instituted, and that the rent was worth \$75 per year. The defendants then introduced a judgment against Messrs. Steele & Adkins, recovered in the district court of the United States at Tuscaloosa, on the 1st of December, 1840, and execution issued thereon, and a deed by the marshal to the defendant, Thomas M. Lyon, dated the 10th August—Lyon having purchased at a sale by the marshal under that execution. Defendant then offered the record of a former trial, wherein Lyon was plaintiff and Badger was defendant, (see case reported 7 Ala. Rep. 564,) which it was admitted was for the premises in question.

Plaintiff then proved, that on the trial of the case referred to, Badger did not offer to show any title in himself, or any one else; but the suit went off under the plea of not guilty,

as stated in the bill of exceptions, which was then sealed. The deed from Badger to the plaintiff was made some considerable time after the commencement of the suit of Lyon against Badger.

The court charged the jury, that the pendency of the suit of Lyon against Badger, at the time the deed from Badger to plaintiff was made, and the recovery as aforesaid in that action, was sufficient to bar and defeat the present action.

T. D. CLARKE and W. S. EARNEST, for the plaintiff in error, contended—1. Two things must concur to make a judgment in one suit a bar to the prosecution of a second: First, that the question was within the issue in the first suit. Second, that the same matter was actually submitted to, and passed upon by the jury in the first suit. And parol evidence is admissible to show, that the matters sought to be litigated in the second suit were not actually passed upon in the first. *Sedden v. Tutop*, 6 Term, 607, (3 Dur. & E. 608;) *McGauren v. Patterson*, 6 Serg. & R. 278; *Snider v. Croy*, 2 Johns. 227; *Phillips v. Bevick*, 16 Ib. 136; *Davidson v. Shipman*, 6 Ala. R. 27; *Rake's adm'r v. Pope*, 7 Ib. 161; *Burt v. Sternberg*, 4 Cow. 559; *Ravee v. Farmer*, 2 Black's Rep. 827; *Lawrence v. Hunt*, 10 Wen. 80; *Le Guen v. Gouverneur*, 1 Johns. C. 436; *Henderson v. Keener*, 1 Rich. Rep. 474; 8 Pick. Rep. 118.

2. If a defendant, having the means of defence, but neglect to use them, he is precluded—except the case of ejectment in which the defendant neglecting to bring forward his title, is not precluded by the recovery against him, from availing himself of it in a new suit. *Kent, J., in Le Guen v. Gouverneur*, 1 Johns. C. 436, at page 502; *Clerk v. Rowell*, 1 Mod. R. 10; *Adams's Eject.* 294, 315. And the same law applies to this action. *Clay's Dig.* 320, § 44; *The Ltate, et ux. v. Nabors*, 7 Ala. Rep. 459; *Sturdevant v. Murrell*, 8 Por. 317.

In this case, Badger's title (now Camp's) was not in the first suit, in any way submitted to the court or jury, or passed upon by either. He offered no title or evidence in the first suit. See bill of exceptions in *Badger v. Lyon*, 7 Ala. Rep. 564, and bill of exceptions in this case.

3. Badger held the superior title to the freehold, coupled with actual possession, at the time of the sale to Camp. See bills of exception in the two cases. He therefore might properly and lawfully sell to Camp, and Camp acquired the same title Lyon had.

No rule of law as to adverse possession—sale of chose in action—applies to this case, or makes the conveyance void. It is the case of one holding the actual possession, selling a good title, while another, who has no title as against the vendor, chooses to prosecute a suit against him.

As to what will make the conveyance void—*Brown v. Lipscomb*, 9 Porter, 472; *Goodwin v. Lloyd*, 8 Ib. 237.

E. W. PECK, for the defendant in error.

1. This action is expressly made by the statute, an action to try titles—to try the titles not of the plaintiff only, but of the defendant also—and the judgment must necessarily be conclusive upon the parties, as to titles upon which judgment is actually given, and also upon the titles then in the parties respectively, and properly determinable. True, if the plaintiff should fail because no trespass, or in other words, no ouster was proved, or because the defendant was legally possessed of an unexpired term, and the title of the plaintiff was a remainder, in such cases, and others of a like character, the judgment would not be conclusive; but these exemptions cannot affect the general rule. It would be repugnant to every principle of justice and public policy, to permit a party to withhold his title, and refuse to give it in evidence, and thus to avoid the conclusive effect of the judgment.—*Kent v. Kent*, 2 Mass. 338, 347, 355; *Adams v. Burns*, 17 Mass. 365; *Cummings, et al. v. McGehee*, 9 Porter, 351; *Adams on Ejectment*, by Tillinghast, 315, 316, and the notes there referred to.

Again, in the case of *Pollard v. Reynolds, et al.* 6 Munf. 433, it is said that a judgment in ejectment is no bar, though for the same land, and between the same defendant and lessors of the plaintiff—the fictitious plaintiff not being the same—and Mr. Adams, in the page first above referred to, gives the same reason why, in the action of ejectment the judgment is not conclusive. but the same reason does not ex-

ist in the action of trespass to try titles under our statute, because the fictions in this action are abolished.

So in the case of *Bradford v. Bradford*, 5 Conn. 127, it is said a former judgment in ejectment against a tenant in possession creates no estoppel to a title since acquired by him from one who was no party or privy to such judgment. This case shows, that as to the title which the tenant then had, the judgment was final; and also, that the title newly acquired, must be from one who was not a party or privy to the first judgment. I therefore insist, that in this case the judgment of Lyon, the defendant's landlord, against Badger, the plaintiff's vendor, on the evidence disclosed in the bill of exceptions, was, in the language of the charge, "sufficient to bar and defeat the plaintiff's action."

2. The purchase of the premises by the plaintiff, of Badger, during the pendency of the action of Lyon, the plaintiff's landlord, against him, for the same premises, was void on the doctrine of *lis pendens*, and also, because it was a purchase in violation of public policy. *Murray and Winter v. Ballace and Hunt*, 1 Johns. Ch. Rep. 567, 577; 2 Kin. Law Com. 131-2; *Doe ex dem. v. McGee*, 8 Ala. Rep. 566, 572; *Jackson ex dem. Hendrix v. Andrews, et al.* 7 Wend. 152; *Jackson ex dem. Bryant v. Ketchum, et al.*, 8 Johns. Rep. 374, ma. 479; *Parks v. Jackson ex dem. Hendrix*, 11 Wend. 442.

COLLIER, C. J.—It is said that a judgment in ejectment confers no title upon the party in whose favor it is given; and that it is not evidence in a subsequent action, even between the same parties. The judgment therefore can never be final; and it is always in the power of the party failing, whether plaintiff or defendant, to bring a new action. *Adams on Eject.* 294, 315-16. One of the advantages, says Bacon, attending this action is, that a man may have a remedy *toties quoties*—being allowed to bring as many ejectments as he pleases. This has sometimes proved to be a great mischief, and courts of equity have interfered, after repeated trials and satisfactory determinations, by granting perpetual injunctions to prevent further litigation. 3 Bac. Ab. Tit. Eject. (I.) Bouv. ed. The structure of the record also renders it impossible

to plead a former recovery, in bar of a second ejectment; for the plaintiff in the suit is only a fictitious person, and as the demise, &c., may be laid many different ways, it never can be made appear, that the second ejectment is brought upon the same title as the first. Adams on Eject. *ut supra*. Although such may be the condition of the record, yet the inconclusiveness of the judgment does not rest on the *form* of the declaration and consequent proceedings, but upon the effect of the verdict and judgment. These entitle the lessor of the plaintiff to the possession of the lands, but do not give him any title thereto, except such as he previously had. If he had a freehold interest, he is in as a freeholder; and if he have no title, he is in as a trespasser, and liable to account for the profits to the legal owner. See Adams on Eject. and Bac. Ab. *ut supra*. These principles are unquestionably well founded at common law, and if in any of the States they are not recognized, it must be, because other rules have been introduced by legislation.

The question arises, are these principles applicable in the case before us. By the act of 1821, fictitious proceedings in the action of ejectment are abolished, and the action of trespass "as well to try titles as to recover damages," was introduced. It was further enacted, that "the laws now in force in relation to the action of ejectment, except as far as relates to fictitious proceedings therein, shall be applied to the action of trespass to try titles," &c. "If the plaintiff in the aforesaid action of trespass recover, he shall be entitled to an execution for possession, as well as for costs and damages." Clay's Dig. 320, § 43-4-5. The statute is explicit, that while the legal fictions in ejectment were abolished, all the laws applicable to that action should be applied to the substituted remedy. This declaration is too general and unlimited to authorize us to restrict it to what may transpire up to the rendition of the judgment in trespass, and to hold that the judgment itself is decisive of the question of title. No greater effect can be accorded to the judgment in the new action, than to the judgment in that which was superseded. The judgment must be regarded as much a part of the action as what precedes it, and can have no greater influence

upon the parties' rights than if it had been rendered in an ejectment.

It is insisted that as the deed from Badger to the plaintiff was made pending the suit of Lyon against the former, that deed was void, and did not convey to the plaintiff the title of the grantor. Conceding that it is not allowable for one who is out of possession of real or personal property held by another under an adverse claim, to sell his right, so as to entitle the purchaser to maintain an action for its recovery, and yet we know of no rule of law operative in this State which inhibits a party in possession of land from investing another with his title, merely because an action is pending against him to recover the possession. The pendency of an action is constructive notice of the matter involved in that suit, and the purchase of the property which is the object of the pending action, will be affected by it, as a purchaser with notice. 2 Blackf. Rep. 258; 1 Rand. Rep. 114; 2 Id. 93; 5 Leigh's Rep. 627; 8 Ala. Rep. 570.

In Jackson v. Ketchum, 8 Johns. Rep. 479, B. purchased the lands in controversy of C. pending an action of ejectment against the latter for the recovery of their possession, and it was held that the deed was void under a statute of New York, "to prevent and punish champerty and maintenance." That enactment the court said, contains the substance of the English statutes of Westm. 1 ch. 25; Westm. 2 ch. 49, and 28 Edw. 1 ch. 11; and was almost a literal transcript of the last. The established doctrine under these statutes, it was added, is, that a purchase, or even a gift of the land while a suit is pending concerning it, if it be made with knowledge of the suit, and be not the consummation of a previous bargain, nor founded on the ties of blood, is within the purview of those statutes, and void, though not punishable under the act of 32 Hen. VIII. against selling pretended titles. In Parks v. Jackson, 11 Wend. Rep. 442, it is admitted that the effect of *lis pendens* upon conveyances of land operates harshly, and the rule is not without its exceptions, and it was said by Mr. Senator Seward, whose opinion was concurred in by the entire court of errors, excepting the chancellor, that he had not found "a solitary case in which the rule of *lis pendens* has been applied to a person who purchases by contract, and en-

ters into possession, and in part performs his contract *before suit commenced*, and then *pendente lite* without actual notice fulfils his contract and takes a deed for the land." We have seen no decision resting upon common law principles, which maintains that a sale and conveyance of land of which the vendor is in possession, is void merely because an action is pending against him for its recovery; and we are aware of no principle of policy in this country, where land is so abundant and easily obtained—where professional assistance is so accessible, and the rights of even the poorest so adequately protected, which would invalidate a transfer of land under such circumstances.

In *Sessions, et al. v. Reynolds*, 7 Smedes & M. Rep. 130, the court say there are no statutes on the subject of champerty in Mississippi; the English statutes of 32 Hen. VIII. ch. 9, on that subject, is not in force there: therefore to avoid a contract on the ground of champerty, the common law offence must be complete. To constitute that offence, it must not only be proved that there was adverse possession at the time of sale, but that the purchaser had knowledge of such adverse possession. We may add, that we find many cases in which the effect of *lis pendens*, to impart notice of the matter in controversy, is considered; but in none that has come under our observation has the pendency of a suit for land been held to take from the defendant in possession the right to sell it, in the absence of a statutory prohibition. Whether, therefore, the conveyance by Badger to the plaintiff was the result of a sale simultaneously made, or whether the contract had been entered into previous to the institution of the suit, the result must be the same.

It follows that the ruling of the circuit court cannot be supported; consequently, its judgment is reversed, and the cause remanded.

JACKSON v. JONES.

1. One of two partners, who has made a usurious contract without the knowledge of his co-partner, is a competent witness for his co-partner, when sued upon a contract he had individually made with the creditor, in which the usurious contract is merged, the partner who is sued having released the other.
2. When notes are executed reserving usurious interest, if afterwards new notes are executed, and any interest is computed on the old notes, and carried into the new, it would render the new notes usurious, and under the statute, void as to the interest.
3. The borrower is a competent witness under the statute, to testify to the fact of usury; but he cannot give evidence of a distinct, and independent fact, and then prove the usury by other witnesses.

Writ of Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

THIS was an action of assumpsit, brought by the plaintiff in error, against the defendant on a promissory note. At the trial, a bill of exceptions was sealed by the judge, which discloses the following facts: The defendant, and one Ferrand, were partners in trade, and during the continuance of the firm, Ferrand, who superintended the business, borrowed of the plaintiff, the sums of money for which he executed the notes of the firm, with a verbal agreement, that the plaintiff should be paid five per cent. a month by way of interest, for the use of the money. The notes however were given for the sums actually lent. Jones the defendant, resided in Dallas county, and knew nothing of the loan or the contract. The interest on the notes, at the rate of five per cent. per month, was paid by Ferrand, from the date of the notes up to August, 1843, and was indorsed, "interest paid up to date." The interest was paid for some twelve or fourteen months. These facts were deposed to by Ferrand, who had been released by the defendant Jones, from all claim and liability on account of the notes executed by him, in the name

of the firm of Jones & Ferrand, to the plaintiff. To the admission of the testimony of Ferrand the plaintiff objected, but the court overruled the objection, and the plaintiff excepted. The defendant then offered himself as a witness, under the statute, to prove that the note sued on was usurious. He offered to swear to these facts: That the note sued on was given in payment by him for the two notes executed to the plaintiff by Jones & Ferrand, and referred to in the deposition of Ferrand; that interest at the rate of eight per cent. was cast upon the two notes, from the time the last indorsement of the payment of interest was made on them, up to the date of the note sued on, and the two notes, together with eight per cent. by way of interest, were included in the note sued on; that he was a partner in the firm of Jones & Ferrand, but did not know of the usurious character of the notes at the time he took them up, and gave his individual note for them.

The plaintiff objected to the defendant's giving evidence of these facts, upon the ground that he could only swear to the facts that constituted usury; but the objection was overruled, and the plaintiff excepted. On these facts the court charged the jury, that if there was an usurious agreement between Ferrand and the plaintiff, by which Ferrand was to pay, and did pay, at the rate of more than eight per cent. per annum for said loan, and if, when Jones executed the note now sued on, any interest, whether at the rate of eight per cent. or more, was for any time calculated on the two notes, and the amount carried into the note sued on, then the defendant was entitled to have this amount deducted from the note sued on, and they would be authorized to find for the plaintiff, only the amount due on the face of the two notes, at the time of the settlement, exclusive of interest, and could not allow the plaintiff any interest on the note sued on. That if Ferrand borrowed of the plaintiff the amount of the two notes, and if it was agreed between the plaintiff and Ferrand, that Ferrand was to pay him, and he did pay him, a note, of interest exceeding eight per cent. therefor, and the note sued on was given for said two notes, and any interest whatever was computed on said two notes, and this interest was carried into the new note of Jones, now sued on, that

the plaintiff could only recover the amount of the face of the two notes given by the firm, deducting from the note sued on, the interest carried into it. To which charges the plaintiff excepted, and these several matters are here assigned for error.

EVANS, for the plaintiff in error.

1. It is a general rule of evidence, that if the effect of the witness's testimony is to increase or diminish a fraud in which he may participate, he is incompetent. 2 Phillips, (Hill & Cow. Notes,) p. 114, n. 108-118; Powell v. Powell, 7 Ala. 582; Wood v. Williams, 9 Johnson, 123. A partner is not competent for his co-partner. This is an interest which the defendant cannot effectually remove by a release. 1 Phillips's Ev. 59, 60; 2 Id. 104, note 111.

2. The party to the *transaction* or *borrower* only is allowed to testify, and then only to the *fact of usury*. If he is not the *party* to the usurious contract, he is inadmissible. Clay's Dig. 590, § 5; Paul v. Meek, 6 Ala. 756; Wilson v. Walker, 3 Stew. 211.

3. Usury, when paid, cannot be recovered back. Carlisle v. Graggs & Gray, 10 Ala. 302.

4. To constitute usury, there must be a corrupt agreement, and like every other contract, requires the concurrence of both parties, and joint participation in the usurious interest. One must contract to pay, and the other to receive usury, and this must be done with corrupt or unlawful intent to violate the statute. Smith v. Beach, 3 Day, 268; Chitty on Bills, 100.

5. And it can be avoided only, between the original parties, or when the suit is on the instrument itself. Jackson v. Henry, 10 Johnson, 185; Dix v. Van Wick, 2 Hill, 522; Cook & Kornegay v. Dyer, 3 Ala. 643.

6. Although a *substituted*, given for the usurious security, is affected with the taint of the original contract, yet a *second bill given to raise money* to pay a former *usurious* one is valid. Chitty on Bills, 108, 109; Cram v. Hendricks, 7 Wend. 569; 2 M. & S. 632. So too if usurious securities are destroyed by mutual consent, and the borrower promise to pay the principal and interest, it is binding. Barnes v.

Hedly, 2 Taunt. 184, 41; Kilburn v. Bradly, 3 Day, 356; Batesford v. Stanford, 2 Con. 276; McClure v. Williams, 7 Vermont, 210; Head v. Ward, J. J. Marshall, 280; Fowler v. Garrett, J. J. Marshall, 681; Chadburn v. Wells, 10 Greenleaf, 121.

7. The giving the note in this case was equivalent to the *purchase* or payment of the original notes, and the only question is as to the *consideration*, and the consideration is sufficient. Barnes v. Hedly, 2 Taunt. 188; Hill v. Atkins, 2 Cowper, 289. Our statute of usury, unlike the English and other statutes, does not *avoid* the contract—the principal is always recoverable.

LAPSLEY, contra.

All the questions arise on the bill of exceptions.

1. Did the giving of the new note by Jones, preclude him from setting up the defence of usury? The authorities say, the new notes can be purged of the usury only by an express agreement to do so; and the payment or deduction of the usurious interest already received. It is not pretended that this was done in this case, and the proof shows that it was not done. See Warren v. Crabtree, 1 Greenleaf, 167; Campbell v. Gill, 4 J. J. Marshall, 48; Chit. on Con. 6th Am. ed. 706; Tate v. Wellings, 3 Term R. 531, and cases in note; Jackson v. Packard, 6 Wend. 415; Bridge v. Hubbard, 15 Mass. 96; Grimes v. Schreem, 6 Monroe, 553.

2. Was Jones competent to testify as he did, in order to establish the usury? He was competent to make the whole proof; certainly he was competent to make an indispensable part of it. The *only fact at all material* stated by Jones, and which was an indispensable fact in the proof of usury, was the simple fact that the new note sued on, was given for the old notes of Jones & Ferrand, which other testimony showed was usurious. This fact, if true, might have been admitted; if not true, the plaintiff could have controverted it by his own oath. Clay's Dig. 590, § 5; Paul v. Meek, 6 A. R. 753; Palmer v. Severance, et al. 8 A. R. 53.

3. Was Ferrand a competent witness for the defendant? See Hill & Cowen's Notes on Ph. Ev.; Bagley v. Osburn, 2 Wend. 527; 4 Phillips' Ev. Supplement, 1337; Lifferts v.

Demott, 21 Wend. 138. Any interest Ferrand might have, if it be contended he had any after the release, would be too uncertain, remote and contingent. Interest, to disqualify, must be *direct*; not remote or contingent. 1 Greenleaf Ev. 134, § 389, 390.

4. If the question should be raised by the record, whether the usurious interest paid on the original notes should have been deducted from the sum for which Jones gave his own note; in affirmance of the proposition, the following authorities are referred to. Winkler v. Scudder, 1 Kelly's Ga. R. 135; Rockley v. Peach, 1 Id. 241; Kay v. Fowler, 7 Monroe, 596; Lollard v. Field, 1 J. J. Marshall, 278; Bartlow v. Bond, 3 Dana, 595; Cruther v. Trabue, 5 Dana, 81; Blydenburgh on Usury, 191, 193. But it is believed this question is not presented in this case. It is certain, the usurious interest paid was not deducted in any way.

DARGAN, J.—The first question presented by the assignment of errors, is, whether Ferrand was a competent witness, after he was released from all liability or claim by Jones, on account of the two notes executed by him to the plaintiff, in the name of the firm of Jones & Ferrand, and which formed the consideration of the note sued on. We are not able to perceive what interest Ferrand had in the suit, after the execution of the release. The firm notes had been taken up by Jones, he giving his individual note in payment of them. Jones had the right to demand of Ferrand his proportion of those two notes, because they were partnership notes, and had been paid by Jones individually. But if Jones releases Ferrand from his liability to account for his part of those two notes, he surely can have no interest in the suit, for he is discharged by Jones from all claim, and Jones has paid the partnership debt. If he has any interest, it is rather on the side of the plaintiff, than the defendant who called him; for if the note sued on is not recovered, his liability on the two old notes may be revived in favor of Jackson, the plaintiff: but if the plaintiff recovers in this suit, the witness is discharged from all liability whatever. It was said however, in the argument, that by defeating the note sued on, the dividend to be divided between the partners, would be increas-

ed ; but this is not so. By the release Jones executed to Ferrand, the debt, which was a firm debt, becomes the individual debt of Jones, and if there be a dividend, it will be divided as if this debt had never existed, or as if it had at all times been the individual debt of Jones, and for which the firm was never liable. Ferrand can therefore have no interest, being released, in defeating the note sued on ; but might have an interest in enforcing its payment, to prevent the revival of his liability to Jackson upon the notes, which were the consideration of this note.

Nor can we perceive any error in the instructions given by the judge to the jury. By the act of 1834, Clay's Dig. 591, usury avoids the entire interest, both the legal and illegal, agreed to be paid ; but the principal actually lent is recoverable. The charge of the court clearly conveyed to the jury, this idea, if they came to the conclusion, that the original notes were usurious, and that the note sued on was given in lieu of them, and any interest was computed on the old notes, and carried into the new note, then the note sued on was usurious, and that they could not allow any interest at all, but the amount of the recovery, must be confined to the amount expressed in the face of the original notes, which was the amount actually lent.

It is certainly the law, that merely giving a new security, will not purge the taint of usury, if it existed in the original contract. But if the usurious contract was abandoned, and the parties agree that the principal, and lawful interest shall only be paid, then the consideration of the loan, would support this promise : or, in other words, the contract would be purged of the usury. See 6 Wendell, 415 ; 15 Mass. 96 ; 6 Monroe, 553 ; 10 Wheaton, 367. But here there was no contract, or extension to purge the original contract, of the offence of usury. Jones did not know that the contract was usurious ; the usurious interest had been paid, and the defendant agreed to pay the principal debt, and lawful interest, not knowing that he was not bound to pay the interest, for he did not know of the usury. The plaintiff knew it, but it does not appear that it was disclosed to Jones. Under such circumstances, it cannot be said that Jones agreed to purge the original contract, of the usury that attached to it, or ex-

isted in it. But we come to the conclusion, that the court erred in permitting Jones, the defendant, to testify that the note sued on, was given in lieu of the two notes of the firm of Jones & Ferrand, to the plaintiff, and on no other consideration.

By the statute, the borrower, or party to the usurious contract, is a competent witness to prove the offence of usury, unless the party will deny under oath, the statement of facts, to which the borrower proposes to testify. See Clay's Dig. 590. But to authorize the party to testify, he must propose to give evidence of the offence of usury, or that the contract was usurious; if he does this, he may state all the attendant circumstances, that will show the offence to be complete. See 6 Ala. R. 753; 8 Ala. R. 53. But he is not permitted by the statute, to give evidence of a distinct, and independent fact only, and then to prove the offence by other witnesses. He is rendered competent by the statute to prove the offence, and if he cannot testify to the offence, the statute does not render him competent to testify to any other distinct matter. Here the defendant was not offered to prove the offence, but the offence was proved by a witness. The defendant knew nothing of it of his own knowledge, but he was permitted to connect the offence thus proved, with the note on which he was sued. In this the court erred, and the consequence is, that the judgment is reversed, and the cause remanded.

DOUGE v. PEARCE.

1. A suit against husband and wife, for a *tort*, does not abate by the death of the husband, unless the *tort* was committed by her in his presence, or by his coercion.

2. Evidence of the truth of the charge, in an action of slander, is not admissible under the general issue.
3. It is not indispensable that a witness for the plaintiff should give the exact language used by the defendant, showing the slanderous words had reference to a trial. If this was considered desirable, he should, upon the cross examination, elicit the precise language used.
4. When a commission issues to three persons to take a deposition, if the parties appear before one of the commissioners, and cross-examine the witness, they cannot afterwards object, that one commissioner had not authority to act.

Error to the Circuit Court of Benton. Before the Hon. G. W. Stone.

ACTION on the case, for slander, by the plaintiff in error against the defendant and her husband, Daniel M. Pearce. Plea, not guilty. Pending the action, Daniel M. Pearce departed this life, and the suit as to him abated, but was continued as to his wife, Elizabeth, who, it is alledged, uttered the slanderous words. Trial and verdict for defendant. Upon the trial, several objections were made to the proof. The charge involved an accusation of perjury, in the giving of evidence upon a trial before a justice of the peace, in which the plaintiff was sworn as a witness, in regard to a contract made by one Durham and the defendant for the threshing of some wheat.

The defendant was allowed, by the circuit court, against the plaintiff's objections, to prove the contract which she made with said Durham, and all the particulars in regard to it. The plaintiff offered the deposition of one R. G. Black, who, after testifying to the words as charged in the declaration, stated, in answer to an interrogatory of the plaintiff, "that the words spoken by the defendant had reference to a trial had before Esq. Handley, about the threshing of wheat;" this being objected to, was excluded by the court, and plaintiff excepted. Plaintiff also offered a deposition, taken under a commission which issued jointly to three commissioners, but had been executed only by one. It appeared that the parties, by their respective attorneys, attended before

the commissioner, and each examined the the witness. It was objected to the deposition, that the commission being joint, and not several, should have been executed by all the commissioners, and the defendant moved to suppress it. Plaintiff offered to prove, that by consent of the respective attornies, it was agreed to dispense with the other commissioners, who, though present at a portion of the examination, were compelled by private business to be absent before the close of the examination. The court refused to hear the proof, unless the agreement was shown to have been reduced to writing, and the plaintiff excepted.

The exclusion of the testimony last named, and the admission of proof of the contract, is assigned as error.

MORGAN, for plaintiff in error.

RICE, contra.

CHILTON, J.—No question is presented on the record as to the right of the plaintiff to proceed against Mrs. Pearce, the defendant, after the death of her husband. For aught that appears, she consented to the continuance of the cause against her, and submitted to the jurisdiction. But were it otherwise, without entering into an investigation of the authorities upon the subject, we are satisfied that if the tort of the wife, for which she and her husband were jointly sued, was not committed by her in his presence, or by his coercion, the suit does not abate by his death. Mr. Reeve, in his *Treatise on the Domestic Relations*, p. 71, in commenting upon the case in *Style*, 138, which was precisely analagous to this, except that the wife, after the death of the husband, and before judgment, married another husband, and in which it was held the action abated, says "it is opposed to the current of authorities," &c.

2. The statement of the proof to be made by absent witnesses, showing the particulars of the contract, was clearly inadmissible as evidence. The issue was, not guilty. No plea of justification was in, and we cannot see how such proof could be relevant to that issue. The rule is too well

settled to require reference to authority, that evidence of the truth of the charge cannot be admitted, unless upon the appropriate plea of justification. The court erred in allowing such proof.

3. We are not informed upon what ground the court excluded the testimony of the witness, Black. It was certainly very material to show, that the words spoken by the defendant had reference to some judicial investigation, upon which the plaintiff was sworn as a witness. This the proof shows. It is not indispensable that the witness should give the exact language used by the defendant, showing the slanderous words had reference to a trial. If this was desired, the opposite party should, upon cross-examination, have elicited the exact language used. While it is not proper for a witness to give his impression derived from the conversation, yet he may, even in proving the words charged in the declaration, give the substance of the conversation. See *Teague v. Williams*, 7 Ala. Rep. 844; *Miller v. Miller*, 8 Johns. R. 74; *Ney v. Otis*, 8 Mass. Rep. 122; *Olds v. Powell*, 10 Ala. Rep. 393.

4. Upon the remaining point—as to the exclusion of the deposition, because it was executed by one of three commissioners, when it appeared the parties, by their attorneys, appeared before the commissioner, and proceeded with the examination, we think the court also erred. Had the deposition been taken by interrogatories, filed in the ordinary way by the parties in the clerk's office, the rule requires the commission, which is joint, should be executed by all. But in this case, the parties examine upon notice of the time and place—they appear, and each examine the witness before one commissioner. If they had intended to raise an objection to the right of one commissioner to certify the deposition, it should have been made at the time, but submitting to the examination, we must, even in the absence of the proof offered and rejected by the court, of the consent of the attorneys to dispense with the other two commissioners, intend, that the parties waived their presence. See *Stebbins v. Sutton*, 2 Stew. Rep. 247; *Spence v. Mitchell*, 9 Ala. Rep. 744. This view renders it unnecessary to examine the effect of the parol agreement of coun-

sel, and the correctness of the decision of the circuit court, excluding the proof of it.

It results from what we have said, that the judgment of the circuit court must be reversed, and the cause is remanded.

RUSSELL v. IRBY.

1. The act imposing a penalty, for cutting down, carrying away, or destroying cypress, and other timber trees, without the consent of the owner, does not extend to a case, where by mistake the party goes beyond his own boundaay, and is under the impression that he is cutting on his own lands, though he would be liable at common law. Whether negligence so gross, as to indicate an entire recklessness, or indifference to the rights of another, would be a substitute for actual knowledge, or authorise its implication, *quere*.
2. Where the master would not be liable if he had cut the trees himself, he will not be liable for the acts of his servants obeying his instructions.

Writ of Error to the Circuit Court of Sumter. Before the Hon. G. W. Stone.

THIS was an action of debt at the suit of the defendant in error, to recover the penalty prescribed by the statute for cutting certain trees on his land. The cause was tried by a jury, who returned a verdict for the plaintiff below for the sum of \$500, and judgment was rendered accordingly. It was proved at the trial, that some of the trees for the cutting of which the action was brought, were cut and removed off the plaintiff's land two or three years previous to the institution of this suit. Testimony was also adduced, showing that the defendant had gone upon the land, carrying with him a pocket compass, and some owners of contiguous lands, and

attempted to ascertain the plaintiff's boundaries ; but at this time part of the land was overflowed, and marked trees could not be distinguished. It was also shown that when defendant sent his hands out to cut timber, he always sent a white man with them, and instructed them not to cut timber on the plaintiff's land ; that once when he sent his hands, he instructed them to call on contiguous proprietors for information as to the plaintiff's boundaries ; at another time he instructed the white laborer who went with the slaves, to inquire of one of the latter where he might cut trees. This was done by the white laborer, and the trees cut at the place designated—part of these were on the plaintiff's land. The trees cut by the defendant's hands from the plaintiff's land were all removed and appropriated by the latter ; but there was no proof that the defendant was aware that his laborers had taken the plaintiff's timber.

The court charged the jury, that if the defendant was guilty of carelessness, and sent his slaves out to cut timber upon land situated as the proof disclosed, and did not put them in possession of such information as would enable them to know when they were upon lands belonging to him, then he is responsible for their acts : if, under these circumstances, the slaves went upon the plaintiff's lands, and cut and removed his timber, the defendant is responsible to him in this action. It was added, that the same rule applied, if the defendant sent out hired white persons under the same circumstances. Thereupon, the defendant prayed the court to charge the jury, that if part of the trees were cut and removed more than twelve months before the suit was brought, then they could not estimate these trees in settling the amount of their verdict ; which charge was refused. The questions arising upon the ruling of the court, are duly presented for revision.

BLISS & BALDWIN, for the plaintiff in error.

1. The statute is a penal law, and must be strictly construed. It can only apply to an act of trespass done wilfully by the defendant, or some one under him by his directions ; or, at most, with gross negligence. *Daggett v. State*, 4 Conn. R. 60 ; *Rees v. Emerick*, 4 Serg. & R. 289 ; *Myers v. Fos-*

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ter, 6 Cow. 567; Jones v. Eustis, 2 Johns. 379; Strong v. Stebbins, 5 Cow. 210; Van Valkenburgh v. Torrey, 7 Cow. 252; see Dig. N. Y. Cases, 1066, § 155-6; Ibid. 151, § 2; Dwarrris on Statutes, Law Library, vol. 9, top p. 72, marg. 743.

2. That if the timber was cut, &c. by servants, white or black, of the plaintiff in error, who sent them to cut on his own lands, with directions not to cut on the defendant's land, plaintiff in error would be liable, if at all, only to an action on the case, and not being trespasser, would not be liable for the forfeiture imposed by the act above cited. The action, if any, on the facts, should be case, not trespass. Broughton v. Whallon, 8 Wend. 476; McManus v. Cricket, 1 East, 106; Barnes v. Hurd, 11 Mass. 57; Campbell v. Phelps, 1 Pick. 62, 66; Blackburn v. Baker, 1 Ala. N. S. 178-9; 3 Stevens's N. P.

3. The statute penalty can only be imposed for a trespass; the title of the act may be looked to if there is any doubt of its construction. See Laws of Ala., Toulmin's Dig. 362—"an act to prevent unlawful trespasses."

4. The bar of the statute of limitations to criminal prosecutions (Clay's Dig. 481, § 34) opposed the plaintiff's recovery. The general statute does not apply, this action not being founded on contract. If the criminal statute does not apply, then there is no statute of limitations to this action. Being a penal law in its construction, it should also be in its limitation. See 2 Kinne's L. C. 276; 15 Wendell; 1 Bay's R. 63; 2 Tread. Const. 517; 1 Kent, 382. The statute could properly be given in evidence under the general issue. 7 Monroe, 353; 1 Stew. 263; 2 Cranch, 336; Story's Pl. 340, Notes; 2 Saunders's Pl. 331; 2 Ala. 80; 2 Greenleaf Ev. § 284-5; 1 Law Lib. 7; Blanchard on Stat. Law, 191.

METCALFE & STEELE, contra.

The charge asked for by the defendant's counsel was properly refused by the court under the pleadings. The statute of limitations relied on, has no application to this case: it applies exclusively to State prosecutions, and not to civil actions or proceedings.

By reference to the act as found in Aikin's Dig. p. 122, it

will be seen that it was designed to apply exclusively to State prosecutions; and in Clay's Dig. p. 481, § 34, it is equally obvious that such was the only design of the act. Taking the acts together, and keeping in mind the subject under consideration before the legislature at the time of its passage, we think it clear, that it was only designed to apply to prosecutions in the technical sense of the term, and has no application whatever to civil actions.

That an action of debt upon a penal statute, is not a prosecution within the meaning of the act relied on, we think equally clear. See on this point Angel on Lim. 304; Clay's Dig. 481; 2 Cowp. 391. If, however, the statute of limitations relied on has any application whatever to the present case, it should have been specially plead. See on this point, Ang. on Lim. 333; 2 Sanders's Rep. 63, note by Williams; 1 Id. 283, note 2 of Williams; 1 Cranch, 343, also 465 in the appendix; 2 Bac. Ab. 292; 2 Mass. T. R. 87; 2 Strange, 701. Besides, the plea is general, applying to all the counts in the declaration. The verdict of the jury is also general upon the entire declaration, and there being a common count in it, the statute relied on can by no possibility have any application to that count—a different statute is provided by law. 1 Dana, 336; 4 Ala. 265; 1 Chitty, 545; 1 Lev. 48; Perkins v. Burbanks, 2 Mass. 81; 3 Ala. R. 103; 2 Dana, 237. The motive, intent and design of the wrong-doer is not material. 1 Chitty, 129. If the injury be the result of carelessness or negligence, the defendant is liable. 1 Chitty, 129; 14 Johnson, 432; 18 Johnson, 288.

It is not necessary, in an action on a statute for a penalty for the defendant below, to know the true owner of the timber. 2 Greenleaf's Rep. 130. And if trespass would lie where a statute imposes a penalty for what was previously a trespass, the action is maintainable in debt on the trespass. 4 Mass. 431.

COLLIER, C. J.—The seventh section of the act of 1807, "to prevent trespasses in certain cases," enacts, "if any person shall cut down, carry away, or destroy, any cypress, white oak, black walnut, pecan, or cherry tree, upon any lands not his own, without first having the consent of the

owner, he shall forfeit and pay the owner thereof ten dollars for every such tree, so cut, carried away, or destroyed." Clay's Dig. 581. There can be no doubt that where a statute imposes a penalty, but omits to prescribe a remedy for its recovery, that an action of debt will lie at the suit of the party entitled to it. The material question in the case before us, is, whether to subject one to liability under the statute, it is enough to show mistake, or even carelessness. We think it entirely clear, that the cutting of trees upon another's land, under the impression that the party had not gone beyond his own boundaries, was not within the contemplation of the legislature. Moral justice would forbid any extraordinary infliction in such a case, and the damages recoverable at common law, would afford an adequate reparation. Whether negligence so gross as to indicate an entire recklessness, or indifference to the rights of another, would be a substitute for actual knowledge, or authorize its implication, need not be considered. The facts before us show nothing more than a mere accident or mistake, consistent with honest intention. This construction of the act rests not upon the mere fitness of the thing, and the suggestions of reason, but is supported by at least one most respectable adjudication directly in point. In *Batchelder v. Kelly*, 10 N. Hamp. R. 436, which was an action under a similar statute to recover the penalty prescribed for cutting and carrying away trees on the land of another, the court said, to subject a party to the penalty; "it must appear that the act was done knowingly and wilfully, and not through mistake or accident; in which latter case the party would be entitled to recover only the value of the injury he had actually sustained. The general tenor of the statute is such, as wholly to preclude the idea that it was designed to apply to unintentional trespasses." This latter remark applies with equal justness to our statute.

If the defendant would not be liable if he cut the trees himself, it is perfectly certain that he cannot be charged if they were cut by his servants, supposing they were obeying his instructions, and not intending to trespass on the plaintiff's land. It is therefore unnecessary to consider how far,

and under what circumstances, one is liable for the acts of others in his employment, either as slaves or hired servants.

In the case cited, it was held, that where the servant of another by mistake or accident, cut trees beyond the line of his employer, the removal and appropriation of the trees by the master, with a knowledge of such mistake, did not show an original, wilful, and intentional cutting within the statute. "Carrying the timber away," say the court, "might have had some tendency to have convinced the jury, that the defendant was cognizant of, and approved the original cutting; but such would not have been the necessary legal effect of the evidence as a rule of law; and most clearly an affirmance of the cutting in this manner would not have altered the original nature of the act, so as to have rendered that wilful and malicious, that was originally an unintentional and accidental trespass. Could it have had any leaning in this point of view, it would only have been for the consideration of the jury." This view is quite sufficient to show that the charge of the circuit court cannot be supported.

The removal and appropriation of the trees by the defendant, makes him liable to pay for them what they were worth, though he was not aware at the time, that they were cut on the plaintiff's land; and this may be recovered, if the defendant has no available defence in some appropriate form of action.

What we have said, will most probably be decisive of the present case. Whether any, or which of our statutes of limitation can be successfully invoked to bar a recovery in an action on the statute in question, we need not inquire. We have but to add, that the judgment is reversed, and the cause remanded.

MITCHELL v. COBB.¹

1. When the register and receiver of the land office determine a controversy between two individuals, claiming the right to enter land under the pre-emption law, and on appeal to the secretary of the treasury he affirms their decision, a court of law cannot review the decision, which is final between the parties. Whether a party would be entitled to relief, either in equity or at law, when a decision had been procured against him by fraud—*quere?*²
2. Parol evidence is inadmissible to establish, whether land was, or was not, an Indian reservation, as higher evidence exists of the fact, at the general land office.

Writ of Error to Benton Circuit Court. Before Hon. G. W. Lane.

THE defendant in error brought an action of trespass against the plaintiff, to try titles to the south-east quarter of section No. 19, township 16, range 8, east. The cause was tried on the general issue, and a judgment was rendered for the defendant in error. During the trial a bill of exceptions was taken, which presents the following facts:

The plaintiff below introduced a pre-emption certificate to the land sued for, issued by the receiver of public land to him, dated 7th March, 1845, and which purported to be issued under the pre-emption act of 1841, and proved, that the defendant was in possession of the land, and rested his case. The plaintiff in error then offered evidence tending to show, that he was entitled to enter the land under the provisions of the act of 1841, and that the defendant in error was not. That a controversy had taken place between the defendant in error, and himself, before the register and receiver, as to the right of entry under the act, and the defendant in error was successful. That an appeal to the secretary of the treasury was taken, and owing to the imperfect manner in which the

papers were sent up, the decision of the secretary was in favor of the defendant in error.

The plaintiff in error offered evidence tending to show, that he had complied with the requisitions of the act of 1841, but that the defendant had not. This evidence was rejected by the court, and the plaintiff excepted.

The plaintiff in error then offered parol proof, tending to show, that an Indian being the head of a family, had been located on said land, in conformity with the treaty of the 24th March, 1832. This evidence was also rejected by the court, and the plaintiff in error excepted.

The plaintiff then offered evidence tending to show, that he claimed the right to enter said land, in opposition to the right of the defendant in error; and had made valuable improvements on it before the defendant in error entered it. This proof was also rejected by the court, and the plaintiff excepted.

RICE, for the plaintiff in error.

1. An entry under the pre-emption act of 1841, by a party not entitled to enter the land, will not enable the party entering it to eject him in possession, who is entitled to enter the land under that act. 9 Ala. R. 596.

2. Parol proof may be given to show, that a Creek Indian, being the head of a family, was located on the land, under the treaty of 1832, and this evidence will show the entry to be void, and the certificate will give the party no title. *Minter v. Crommelin*, 9 Ala. R. 596.

WALKER, contra.

1. The evidence does not show fraud in the entry, but at best a mistake merely, and the register and receiver are made by law, the judges to determine on the right of an applicant to enter land under the pre-emption act, and their decision cannot be collaterally impeached in a court of law. *Crommelin v. Minter*, 9 Ala. 607; 13 Peters, 510.

2. An Indian reservation, under the treaty of 1832, would become subject to entry under the pre-emption act, unless the Indian continued in possession, or had sold it in accordance with the treaty.

DARGAN, J.—By the first question presented to the consideration of the court, the plaintiff in error seeks to review the judgment of the register and receiver, in granting the pre-emption certificate to the defendant in error. This he cannot be permitted to do. By the act of 1841, (Peter's Dig. vol. 5, p. 456,) all questions as to the right of pre-emption, arising between different settlers, shall be settled by the register and receiver of the district in which the land is situated, subject to an appeal to, and a revision by, the secretary of the treasury. The plaintiff and defendant in error had a controversy as to the right of pre-emption to the land now sought to be recovered. This controversy was settled by the register and receiver, in favor of the defendant in error. The plaintiff appealed to the secretary of the treasury, and his decision was also in favor of the defendant in error; and a pre-emption certificate issued to him. This decision is therefore final. Between the parties, it is no longer a question that can be litigated, and a court of law cannot review, or re-investigate the rights of the parties to enter this tract of land, under the act alluded to. But the decision of the register and receiver, when confirmed by the decision of the secretary of the treasury, on an appeal, is final and conclusive as to the rights of the parties. It is unnecessary to speculate on the question, whether in law or in equity, the plaintiff would be entitled to any relief, if the defendant in error had committed a fraud on the rights of the plaintiff, in procuring a decision in his favor, or if the decision was procured by fraudulent means—for the evidence in this case does not show that the defendant in error was guilty of any fraud. The circuit court, therefore, did not err in rejecting the proof tending to show that the plaintiff was entitled to enter the land, under the act of 1841, and that the defendant was not.

It is unnecessary to examine whether the land sought to be recovered, was subject to entry under the act of 1841, for if we were to admit, that an Indian reservation under the treaty of 1832, entered into between the United States and the Creek tribe, is not subject to entry under the pre-emption act referred to, it is very certain, that mere parol proof cannot be received to show that the land was part of an Indian

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reservation under that treaty. The lands of the Creek tribe have been surveyed, in pursuance of the terms of the treaty, and the reservations have been selected and located in pursuance thereof. The evidence of these locations exists in writing, at the general land office, and affords the best proof of the fact, whether the land sued for was, or was not, an Indian reservation under the treaty. Without, therefore, expressing any opinion, whether an Indian reservation under this act is subject to entry, or whether the defendant could take advantage of it in this suit, if it was not, it is sufficient to say, that the court did not err in rejecting the parol proof offered to show, that the land sued for, was part of an Indian reservation.

It follows, that there is no error in the record, and the judgment of the circuit court is therefore affirmed.

DEMENT, ET AL. V. THE ADM'RS OF BOGGESS.

1. Although the orphans' court may have taken jurisdiction of the settlement of an estate, yet if there are assets in the hands of the administrator not administered, and the settlement in the orphans' court, though it purports to be final, remains to be completed as to the various sums left in the hands of the executor, chancery may take jurisdiction.

Writ of Error to the Chancery Court of Madison county—
22d District. Before the Hon. W. W. Mason, Chancellor.

THIS was a bill exhibited in the chancery court of Madison county, by John Dement, George B. Smith, and Benj. F. Hammond, in which they charge, that one Bennet Boggess departed this life, having made his will, which being proved, one Rhoda Horton and William H. Clopton, were

appointed by the orphans' court of Madison county, administrators, with the will annexed, of said estate. That they reported the estate insolvent, and obtained authority to sell the personal, and a portion of the real estate. That said administrators, well knowing the testator to be seized at his death, of a tract of land, described as S. E. qr. and the E. half of the S. W. qr. of section 4, township 2, in range 2, west, &c., failed to take any steps to subject it to the payment of the debts of the estate. That a suit for the recovery of said land, instituted by testator and pending after his death, against one Harrell, was suffered to abate. That on final settlement made by the administrators, after the payment of preferred claims, a dividend was said to be declared of sixty cents in the dollar, on other claims. That complainant, Dement, was a creditor of said testator to a large amount—that he owns various claims which the bill particularly describes, as nominally belonging to others, and which were listed by the administrators in their account with the orphans' court. That after deducting the amount which he had received from the said administrators of Boggess, a large amount still remains due him. That he became the purchaser of certain slaves sold by the administrators, and gave his note with security for the property, amounting to \$6,668 which note was payable one year after date, with interest from the time of its execution. That the other complainants, Smith and Hammond, were his sureties on the note. That the note was put in suit by the administrators, and under the belief that he could make no defence at law, he permitted a judgment to be rendered for the amount of the note, with interest. The bill asserts, that the charge of interest was unauthorized by the order granting authority to the administrators to sell. That in 1845, complainants made a calculation of the amount due, less the one year's interest, which they contend they should not be bound to pay, and after deducting the amount previously paid, there remained due only the sum of thirteen dollars, which they offered to pay, but which it was agreed might be considered as tendered. They assert their readiness to pay this sum. The bill further charges, that in the settlement in the orphans' court, the ad-

ministrators were allowed interest on sums paid out by them, when they had, at the same time, funds in their hands belonging to the estate, upon which they were charged no interest. That they failed to charge themselves with interest collected by them; also, with \$80 checked out of bank as monies of testator. That they failed to charge themselves with interest on their own purchases, though due before the settlement. It is further alledged in the bill, that various sums have been, by the order of the orphans' court, permitted to remain in the hands of the said administrators, to provide against contingencies which have not, and never may happen—such, for example, as \$500, the amount of a claim allowed one Samuel Johnson, and which complainant, Dement, on the settlement, threatened to take to the supreme court, and which never has been taken up. Also, \$319 39 retained by them to prosecute a suit against one B. Thompson, &c. That said suit has been ended, and this sum is more than sufficient to pay the cost thereof. Also, that \$200 were retained to prosecute suit against one Harrell, when in fact no suit has ever been commenced. Complainant, Dement, asserts his right to a dividend in all the monies so retained, and not accounted for by defendants, and also, in the interest with which they should be charged.

The bill further alleges the death of Rhoda Horton, and the appointment of defendant, Robinson, his administrator, in 1846. Also, that Clopton has removed from this State to Mississippi.

The bill prays an injunction against the collection of the balance of the judgment at law, and that on final trial defendants may be required to satisfy in full the balance of the claims due the estate of Boggess to Dement, and for general relief.

To this bill the defendants appeared, and filed their demurrer, which the chancellor sustained, and dismissed the bill. His decree is here assigned for error.

S. D. J. MOORE, for plaintiff in error, cited 1 Story's Eq. 543, § 579; *Humphries v. Moore*, 9 Por. 283; *Thompson, judge, v. Searcy & Fearne*, 2 Ib. 226; *Bank v. Hooks & Davis*, Ib. 270; *Wms. Ex'rs*, 1239; 1 Story's Eq. 542.

CHILTON, J.—It seems that most, if not all, of the matters urged as grounds of complaint in this bill, could very properly have been litigated and determined by the orphans' court. That court, by our various statutes, is invested with enlarged powers over the estates of deceased persons; but the enactments conferring this authority do not prohibit the courts of chancery from the exercise of that jurisdiction which had previously vested in the courts of chancery, and in such case, the uniform interpretation is, that they confer concurrent, not exclusive jurisdiction. 1 Story's Eq. 96, § 80. It is clear, that in the exercise of its original powers, which remain unimpaired by statutory inhibition, the courts of chancery have jurisdiction over estates in the direction and control of executors and administrators, and in protecting the rights of creditors, as well as decreeing distribution of the assets. But as the exercise of this power is not exclusive, but concurrent with the orphans' court, the question arises in this case, whether that portion of the assets of the estate which was embraced in the final settlement had in the orphans' court, and upon which that court has adjudicated, can now be made the subject of an original application to chancery. It is not denied but that there may be cases where the jurisdiction of the orphans' court, limited as it is by legislative grant, may not enable that court to afford relief; in such cases, the court of chancery is adequate to the emergency. *Leavens v. Butler*, 8 Por. 381. But when that court, having jurisdiction of the subject matter, proceeds to determine upon it, can the parties resort to the chancery court to overhaul its decisions? The general rule is, that when courts of law and equity have concurrent jurisdiction, and a defendant elects to defend at law and fails, he shall not afterwards be permitted to recover in equity, unless such failure has resulted from unavoidable accident or fraud, unmixed with negligence on his part. *Thomas, et al. v. Hearne*, 2 Porter, 262.

In *Cherry & Bell v. Belcher*, 5 S. & P. 131, the court say that where a bill in chancery is filed by a distributee to compel the payment, by the representatives of an estate, of a distributive share, the fact that the orphans' court has previously by settlement (final or otherwise) ascertained the

amount to which the distributee is entitled, will not preclude the representatives from showing mistakes in that settlement, or payments subsequent to the settlement, and of which he was then ignorant ; or *any other* matter which in equity and good conscience may be relied on in defence.

In *Blakey, Adm'r, v. the Heirs of Blakey*, 9 Ala. R. 391, it is held that the chancery court may take jurisdiction, after proceedings have been commenced in the orphans' court, in a proper case, and having jurisdiction for one purpose, may retain the bill for all purposes, and proceed to make a final settlement. In this case, a portion of the assets was withheld by the administrator, and the bill sought to enforce the trust and to discover assets, &c.

These authorities are persuasive to show, that although the orphans' court may first have taken jurisdiction, yet as there are assets (assuming the charges in the bill to be correct, and the demurrer admits them, if well stated,) in the hands of the administrator not administered, and as the settlement in the orphans' court, though it may purport to be final, remains to be yet completed as to the various sums left in the hands of the executor, we think the bill can be well sustained. But when the trust fund is ascertained, there are, as we are advised by the bill, other persons, creditors, who are interested in the fund: these should be parties, either complainants or defendants, to the bill. So neither can the land be subjected to the payment of the debts, without the heirs are made parties.

As to the interest charged against the complainants, they agreed to pay it when they purchased the property, and they alledge no fraud, imposition or mistake, in giving the note, but only misapplication of the interest by the administrator. There is therefore, no reason why they should not be charged with it. The injunction should therefore have been dissolved. We are of opinion, and so decree, that the decree of the chancellor be reversed, and the cause remanded ; that the complainants be allowed to amend their bill making the proper parties ; and that an account be taken of the assets, and distribution be decreed of the trust fund.

JONES v. JONES.

1. A consent by husband, and wife, to live apart, does not authorize either to charge the other with a desertion from bed and board, with the intention of voluntary abandonment.

Writ of Error to the Court of Chancery sitting in Greene county. Before the Hon. D. G. Ligon, Chancellor.

The plaintiff in error filed his bill, stating the marriage of himself and the defendant, together with other appropriate facts, alledging that she had voluntarily left his house, bed and board, more than three years, and had voluntarily remained away ever since, with the intention of abandoning him; and thereupon praying a divorce *a vinculo matrimonii*. The defendant answered, admitting the marriage of herself and the plaintiff, and that she had left his bed and board more than three years, but denying she had done so *voluntarily*, with the intention of abandonment—and further insisting, that the plaintiff not only consented, but was anxious they should live apart, &c. Accompanying the answer, a deed is exhibited, entered into by the parties more than three years after the defendant left the plaintiff's house. This deed recites the separation of the parties—their intention never to live together again, and in consideration thereof, the plaintiff makes a settlement upon trustees for the support and maintenance of the defendant, who join in the deed, and enter into the usual covenants on her behalf.

Many depositions were taken at the instance of each party, but the view taken of the cause by this court, does not require that the facts should be here recited. The chancellor was of opinion, that the plaintiff did not only consent the defendant should leave his house, but was anxious that she should do so—and that both parties had sanctioned their

separation ; thereupon he dismissed the bill at the complainant's cost.

J. ERWIN and W. M. MURPHY, for the plaintiff in error, cited Clay's Dig. 170, § 3 ; 3 Taunt. Rep. 421 ; Shelf. on Mar. and Div. 417, 418, 429, 430, 431, 432, 433, 434, 445, 625.

J. B. CLARK, for the defendant, cited 1 Eng. Ecc. Rep. 200, 208 ; 3 Id. 329, 335 ; 4 Id. 338, 358 ; 3 Pick. R. 503, 299 ; Holc. Eq. 129 ; 5 Ala. Rep. 76 ; 1 Johns. Ch. R. 491 ; 4 Id. 503 ; Shelf. on Mar. and Div. 427, 428, 432 to 456 ; Paley's Philo. 204, 206, 211.

COLLIER, C. J.—Marriage is a contract of a peculiar nature, and differing in some respects from all others, so that the rules of law which are applicable in expounding and enforcing others, may not apply to this. Its foundation, like that of all other contracts, rests on the consent of the parties ; but the rights, obligations or duties arising from it, are not left entirely to be regulated by the agreement of the parties. These are, to some extent, matters of municipal regulation, over which the parties have no control by any declaration of their will. Unlike other contracts, it cannot in general, amongst civilized nations, be dissolved by mutual consent ; and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, and the like, from performing his part of the mutual contract. Shelf. on Mar. and Div. 16.

Malicious desertion, though a ground of divorce in some countries, is not thus recognized in England. 2 Addams' R. 302, 303 ; 1 Hagg. Cons. Rep. 120, 154 ; 1 Hagg. Ecc. R. 784. But our statute of 1832, "amendatory of the laws concerning divorce," enacts, that "the several chancery courts of this state are hereby invested with full power and authority to decree divorces in the manner prescribed by law, and in the following cases, that is to say : in favor of the husband, where his wife shall have been taken in adultery, or voluntarily left his bed and board for the space of three years, with intention of abandonment ; and in favor of the

wife, where her husband shall have left her for the space of three years, with intention of abandonment; or where he shall have abandoned her, and lived in adultery with another woman; or where his treatment of her is cruel, barbarous or inhuman." Clay's Dig. 170, § 3. Although the general terms of this enactment might embrace a mere consensual arrangement between husband and wife, under which the latter left the bed and board of the husband, and continued separated from him for three consecutive years, with the intention of abandonment, yet we apprehend that no one would contend for such a construction. Whatever may be the effect of the statute when correctly interpreted, it never was the intention of the legislature to detract from the sanctity of the matrimonial contract—to allow husband and wife of their own volition and mutual pleasure, to separate, and at the expiration of the prescribed period of abandonment, to grant a divorce to the party who continued to occupy the premises where they had lived together. Nothing of this kind could have been intended. The introduction of such a term into the contract of marriage, would have made it easy of dissolution, and greatly have impaired its value as a moral and social institution.

But the act of 1820, "concerning divorce," declares, that the decree pronounced by the court shall not operate so as to release the offending party, and thus indicates that a mere consent to live apart, in which each party may be alike faulty, does not authorize either to charge the other with a desertion of bed and board, with intention of voluntary abandonment. And such has been the practical construction of the statute, as well by the courts as the legislature.

What are the facts of this case, so far as it is material to notice them? From the testimony of the nearest relatives of the parties, and those most intimate about their house, it is satisfactorily shown, that their tempers and dispositions were unsuited to each other; and instead of harmonizing in their views, their affection soon lost its vitality. In less than nine months after their marriage, each seemed to be

willing to separate from the other, and desirous to have the terms of separation adjusted. The defendant became very offensive to the plaintiff, and the plaintiff frequently signified to her, her brother, in whose family she had previously lived, as well as other persons, his anxiety for her to leave his house—having withdrawn himself from her chamber some five months after they were married, for what he regarded as a grievous insult to his feelings. Under this state of things, which promised no hope of reconciliation, the defendant, after living in the plaintiff's house about nine months, left it, went to her brother's, who lived not more than two miles distant—has not since returned to the plaintiff, or been requested to do so. A few days after the expiration of three years from the period of separation, a deed was executed, providing for her support, and stipulating for a perpetual disunion. Here then is a case in which, although the wife leaves the husband's house, each agrees with the other to dissever their fortunes. It does not establish the allegation that the wife had left the husband's bed and board with intention of voluntary abandonment—it does not put the wife in fault, so as to authorize the husband to demand a divorce. We need not consider whether the articles of separation, being executed more than three years after the defendant left the plaintiff's house, could affect the right to a divorce, if it was otherwise made out by proof.

We have purposely avoided considering the testimony more in detail, as it could subserve no other purpose than to awaken unpleasant recollections, and open still deeper, wounds which, though not healed, may have become less painful, because they have become chronic. It remains but to add, that the decree of the chancellor is affirmed.

RUSSELL v. LA ROQUE & HATCH.

1. A surety, received a promissory note from the principal debtor, as an indemnity, which he afterwards handed over to the creditor, as a collateral security, by whom suit was brought upon it; the creditor cannot recover upon the note, if the statute of limitations has effected a bar in favor of the surety, upon the principal debt.
2. If the note received by the surety as an indemnity, was handed to the creditor in payment of his liability, it would be no defence to the principal, when sued on the substituted note, that the statute of limitations had created a bar to the suit, upon the original debt.

Error to the Circuit Court of Sumter. Before the Hon. S. Chapman.

ASSUMPSIT by plaintiff in error, on a promissory note for \$700, due first March, 1839. Amongst other pleas, the defendants filed a plea *puis darrein continuance*, the substance of which is, that the note sued on, was given by defendants, to plaintiff, to protect him, and one Lewis, from the consequences of their being surety, for La Roque, on a note for about the same amount, to the Tombeckbee Railroad Company. That since this suit was commenced, six years had elapsed, and the bar of the statute of limitations had become complete, as against the note given to the company; and thereby Russell, and Lewis, were fully protected, and discharged from all liability on the note to the company.

Several replications were made to this plea, two of which only need to be noticed, the fourth and fifth. The fourth is, that on the day of the commencement of this suit, the plaintiff turned out the note in suit, to be collected, and the proceeds applied to the payment of the note held by the company; and that this suit is prosecuted, for the benefit of the company, and to pay said note, and that thereby the plaintiff had waived the statute pending this suit.

The fifth asserts, that on the day of the commencement of this suit, the plaintiff turned out the note sued upon, in pay-

ment, and discharge of the note held by the company, and that the company is prosecuting this suit, in the name of the plaintiff, for the purpose of collecting the same, and when collected, to be in payment of the debt, &c.

To these replications, the defendant demurred, and the court sustained the demurrers to both replications, and rendered judgment for the defendants, which is the matter now assigned as error.

BALDWIN, for plaintiff in error, insisted—

1. That the plaintiff, the surety, was not bound to plead the statute of limitations. *Ford v. Keith*, 1 Mass. R. 139; *Burge on Suretyship*, 369.

2. That if the turning out the note by Russell to the Tombeckbee Railroad Bank was an admission of the principal debt, the continuing to prosecute the suit was a continuing admission. See this case, 11 Ala. R. 388.

3. That the statute of limitations had no effect as to Lewis, who lived in another State. See 7 Leigh R.

4. That at the time of suit, the plaintiff, Russell, had a right to sue and recover judgment, as this court have heretofore determined; and, transferring the note to the creditor, the bank, it then had the same right; and the intervention of the statute bar during the pendency of the suit on the note turned out to plaintiff, does not defeat the action. The surety, Russell, then had an immediate right to the money in the note, and by the transfer, the bank had the same right.

5. By turning out the note as collateral security to the principal debt, with directions to apply the proceeds to the payment of the principal debt, the bank's attorney acted, in receiving the note and suing on it, and would act, in receiving and applying the money, as trustee and agent of the plaintiff, Russell, at least, in part.

6. In equity, the creditor was entitled to the securities of his debtor; and when the debtor transferred the possession of the security, the creditor was entitled to receive the proceeds; and the security might remain, even if it were shown, as it has not been, that the principal debt has been extinguished. See 1 Ala. 708; 2 Id. 331, 400; 4 Id. 223; *Eastman v. Foster*, 8 Metcalfe, 19.

REAVIS, contra.

DARGAN, J.—This cause has been tried before this court, and the rules applied to it then, is the law of it now. It was decided in 11 Ala. Rep. 388, that this note, although given as an indemnity against the note held by the company, could be sued, before the securities had paid the note on which they were bound.

It was further held, that the handing over of the note sued on, to the company, for the purpose of collection, and when collected, to be applied to the note held by the company, was an admission by the plaintiff, of his indebtedness on said note, and that the statute of limitations of six years, would commence running from the time such admission was made.

The rule laid down in this case then, must govern it now, and under the decision before referred to, the original debt to the company is now barred, notwithstanding this suit. The handing over of this note, on the day the suit was brought, was an admission of the indebtedness at the time; suit could have then been commenced on such admission, or promise, but the plea avers, that since then six years have elapsed, and that the statute bar is perfected; and the only question is, if the note sued on was handed over as collateral security merely, can it be recovered after the original debt is barred by the statute? If the suit had been brought by Russell on his own account, as he had the right to do, could he now recover? He has paid nothing, and the debt on which he is security, is now barred by the statute; can he now revive the debt so as to bind the principal? This question is settled in this court, in the case of Lowther v. Chappell, 8 Ala. Rep. 356. If he could not revive the original debt by a new promise, and is now protected by the statute, which he cannot waive, as to the defendants, he could not recover on this collateral security. If, then, the suit had been brought by Russell on his own account, the bar to the debt, on which he is security, would defeat his recovery in this suit.

Does the plaintiff stand in a better condition, having handed it over to the company, merely as collateral security? The company holds the note, in the same plight and condition that Russell held it, and cannot recover, if Russell could

not. See *Bank of Mobile v. Hall, et al.* 6 Ala. Rep. The court therefore did not err, in sustaining the demurrer to the fourth replication.

I at first was inclined to think, that the company held it in a different, or a better right than Russell did, although Russell handed it over as collateral security merely; but on reflection, we are satisfied, that their rights are equal, and no more, to the rights of Russell. They gave up nothing for it; they did not even promise to indulge Russell, in consideration of the transfer to them.

But the fifth replication avers, that the note was handed over to the company, in payment and discharge of the note held by the company, and the demurrer to this replication was sustained. This was clearly erroneous. The note sued on was given as a protection to Russell; he had a right to use it for that purpose, and if he handed it over to the company in extinguishment of the liability he had incurred, as the security of La Roque, it then answered the purpose for which it was intended, and he had the right so to use it. For this error, the judgment must be reversed, unless it appear, that the error worked no prejudice to the plaintiff.

The evidence is not set out on the record, and we do not know what it was, nor what proof the plaintiff could, or would have introduced, if the defendant had been compelled to take issue on this replication. We cannot therefore say that he has suffered no injury by the error; and with the view of ending the litigation in this cause, we will lay down three rules, by which this suit should be tried.

1. If the note sued on, was handed over to the company, or its agent, as collateral security merely, for the debt on which Russell was liable, the note cannot be recovered, if the original debt is barred by the statute.

2. But if the note was handed over, in extinguishment or payment of the debt on which Russell was security, then the plaintiff ought to recover.

3. The original debt is barred by the statute of six years, from the time this note was handed over, unless there was an express agreement between Russell and the company, that he should not be sued, during the pendency of this suit.

If the issue shall be finally found for the defendant on the

plea puis darrein continuance, the plaintiff will recover cost up to the time of filing that plea, and the defendant will recover his cost subsequently accruing.

Let the judgment be reversed, and the cause remanded.

JONES v. THE STATE.

1. One who has received a pistol from the State to keep until demanded, and who has given a bond for its return, has such a special property in it, as will sustain an allegation in an indictment for the larceny of the pistol, that it was his property. It will not vary the case, that the pistol is not in his actual possession, but is in the possession of his overseer.
2. It is not an error of which the prisoner can complain, that the jury omit to find the value of the stolen property.
3. Insanity, intervening between the time of the alledged offence, and the trial, will not exculpate the prisoner.
4. If, from the appearance and conduct of the prisoner, when called on to plead, there is reason to believe he is insane, the court should institute a preliminary proceeding, to ascertain his sanity. Yet this must be left to the sound discretion of the court, and if the prisoner pleads to the indictment, the omission of the court to institute the preliminary inquiry, cannot be assigned as error, though from the facts as set out in the record, there may be strong grounds for the belief, that the prisoner was insane at the time of the trial.

Writ of Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

The plaintiff in error was indicted in the circuit court of Dallas county, for the larceny of a pistol, charged in the indictment to be the property of one Ashley W. Speight, and of the value of fifteen dollars. At the fall term of said circuit court, 1847, the prisoner was arraigned, and pleaded not guilty to the indictment. Thereupon came a jury, who re-

turned a verdict of guilty, but did not in their finding, assess the value of the pistol.

Upon the trial, a bill of exceptions was taken at the instance of the prisoner's counsel, from which it appears, that the pistol named in the indictment belonged, at the time of the alledged larceny, to the State of Alabama, and not to Speight ; that Speight, being a member of a horse company, had received the pistol on loan from the State authorities, and had given bond according to law, for its return to the State. That the pistol, when taken, was not in his immediate possession, but was upon his plantation, in possession of his (Speight's) overseer, some twenty miles distant from Speight's residence. Many circumstances were proved, conducing to show, that the prisoner, at the time of the commission of the alledged offence, was insane, and a physician who heard all the evidence, gave it as his opinion that the prisoner had been laboring under a progressive insanity from July or August, 1846, until the trial. That he was insane prior to the commission of the alledged offence, and was greatly so at the time of trial.

Upon this evidence, the prisoner's counsel asked the court to charge the jury, that if the pistol, at the time it was taken, belonged to the State, and not to the person named in the indictment, the prisoner must be acquitted ; this charge the court gave, with the qualification, that although the pistol may have belonged to the State, yet if it was held by Speight in the manner above set forth, it gave him sufficient property to sustain the averment contained in the indictment; to which charge as given, the plaintiff's counsel excepted. The court was further asked to charge, in behalf of the prisoner, that if his insanity commenced before the commission of the alledged offence, and was progressive and still continues, the jury should acquit him ; which charge the court gave, with the qualification, that if he was sane at the time the pistol was taken, the defence would not avail him. To this qualification of the charge asked, the prisoner, by his counsel excepted, and the assignments of error present the legality of these charges for revision in this court, as well as the sufficiency of the verdict.

G. W. GAYLE, for plaintiff in error.

I. A. W. Speight had neither an absolute or special property. 1. Speight had only the charge, or use of the pistol, and the possession and property remained in the State. See 2 Russ. 117-18; 1 Hawk. P. C. ch. 33, § 9; Com. v. Morse, 14 Mass. Rep. 217; Morton v. The People, 8 Cow. 137; Dillenback v. Jerome, et al. 7 Cow. 294.

2. To strengthen the above view, the pistol may be said to have been in the custody of the law. See Clay's Dig. 53, § 5; 2 Russ. 173; 14 Mass. 217; 8 Cow. 137; 7 Ib. 294.

3. There are but two kinds of property, absolute and special. The special can only be in one person. If Speight was the bailee of the State, he had parted with the possession to his overseer, and therefore with the special property.

4. But the court should presume the witness, Speight, to be mistaken. The Colonel of the regiment gave the bond to the State, when Speight was a mere member of a volunteer company. See Clay's Dig. 53, § 5.

If the special property then is in any one else than the State, it is in the Colonel of the regiment to which the volunteer company belonged, for there cannot be two distinct bailees of the same property.

II. The qualification of the charge on insanity lead the jury to find a verdict contrary to evidence. 1. If the insanity commenced and existed prior to the asportation of the pistol, and was progressive up to the trial, it is impossible the accused could have been sane, when the alledged offence was committed.

3. The record does not show that the jury found the value of the pistol. Roscoe's Cr. Ev. 577; The State v. Flora, 4 Porter, 111.

WM. L. YANCEY, *pro* Attorney General, for the State.

1. Under the proof, A. W. Speight had a special property in the pistol. 2 Russ. on Cr. 107-8, 159; 1 Hawk. Pleas, 145, § 13; Commonwealth v. Morse, 14 Mass. 217; Norton v. People, 8 Cow. 137; Dillenback v. Jerome, et al. 7 Ib. 294; Clay's Dig. 53, § 3, 4, 5, 10, 11.

2. The court must presume that the witness spoke the

truth, and was not mistaken. Speight may have recently been Colonel of the regiment, or some other officer therein, and the record does not deny such a presumption. And such a presumption is necessary to sustain the evidence. Clay's Dig. 53, § 4, 5, 10, 11.

3. If the Colonel of the regiment, "or some other officer," had not given bond, then the common law governs the case, and Speight had a special property in the pistol. 2 Russ. on Cr. 109, 159; Rex v. Savage, 24; Eng. C. Law, 247; Hale's P. C. 513; 2 East's Crim. Law, 16, § 90, 653.

4. The possession by the overseer, was the possession of Speight. Com. v. Morse, 14 Mass. 217.

5. The qualification of the charge as to insanity was properly made. The proof was not positive that the prisoner was continually insane, up to the commission of the crime; and if so, the charge asked called for an acquittal of the prisoner, even if sane at the moment of stealing the pistol. State v. Martin, 2 Ala. 43.

6. The value of the pistol need not be found by the jury, specifically. It was alledged in the indictment, and the jury, by the verdict of guilty, responded to it. Value of a slave is found, because the law gives it to the owner. Besides, the plaintiff in error could not suffer by the failure to find the value.

CHILTON, J.—1. The first question proposed for our consideration is, whether the facts as stated in the bill of exceptions, show such property in the pistol, in Speight, as will sustain the indictment, and render the qualification given by the court, in connection with the first charge prayed for by the prisoner's counsel, proper? It is laid down in the books generally, that where the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor. See 1 Hawk. P. C. c. 33, § 9; 2 Russ. 107. The distinction is drawn between the bare charge of goods, or a special use in them, and a general bailment; in the one case, the possession is supposed to be in the owner, and the party having the charge, or use, may commit larceny of them; in the other, he acquires a special property, and it is not the

subject of felonious conversion by the possessor. 2 Russ. 108. But whenever a special property in the goods vests in the holder, by reason of a contract creating a bailment, there is no doubt but that it is sufficient to describe the chattel as belonging to the bailee. The indictment may charge the property to belong either to the general or special owner. Examples are given in the books of this character, such as a lessee for years, a bailee, a pawnee, a carrier, and the like. 2 Russ. 157. It is clear to my mind, that Speight having received the pistol to keep, until demanded by the State, and having given his bond for its return, has a special property in it, and the fact that it was left with his overseer, on his farm, cannot alter the case. The overseer's possession was the possession of his employer, who was bound for the return of the chattel. The employer is then as much in possession of this article of property as of any other in the charge of his overseer. See cases referred to in the defendant's brief.

2. That the jury did not find the value of the property stolen, is not erroneous; but if it was, it is an error of which the prisoner cannot complain. It has no effect upon his guilt or innocence, but is only important as it relates to the restitution of the property stolen. That he is not required to restore the property, or that the jury have not, by their verdict furnished the party aggrieved by reason of the larceny, with the means of obtaining judgment, under our statute, for the value of the pistol against the prisoner, is certainly no injury to him, and not having been injured, he cannot complain.

3. The remaining inquiry relates to the legality of the charge as qualified by the presiding judge. We are informed by the bill of exceptions, that there were strong circumstances tending to show the prisoner's insanity, from a period anterior to the commission of the alledged offence, down to, and at the trial. A physician, who heard the testimony, gave it as his medical opinion, that he was afflicted with progressive insanity from a period some time before the time of the alledged offence, and was greatly insane at the time of the trial. Now we agree with the court, that if the prisoner was sane at the time of the commission of the offence, the jury should not

have returned a verdict in his favor. It is beyond question, that insanity intervening between the time of the alledged offence and the trial, cannot have the effect to exculpate the prisoner. There is then no error in the charge of the court, but the only matter of any difficulty is this. The evidence strongly indicated, perhaps was conclusive, of the prisoner's insanity *at the time of the trial*. Under such circumstances, it was not proper that he should have been put upon his trial. By the humanity of the common law, a party who was insane at the time of the trial, could not be arraigned. If he became insane after his conviction, he could not be executed while he remained thus demented. See 1 Hawk. P. C. 3, § 3; 1 Hale, 34-5; 1 Russ. 13; 4 Bl. Com. 25.

In the Commonwealth v. Seth Braley, 1 Mass. Rep. 102, the prisoner was brought into court, and the indictment for killing his wife being read to him, he was asked the usual question whether he was guilty or not guilty, the prisoner said he did not know what to answer, it seemed to him he had seen her since. The court suspended the arraignment, giving the prisoner time to consider, and after another attempt to have him plead, which was ineffectual, being satisfied from his appearance and conduct he was insane, a jury was immediately impannelled and sworn "well and truly to try between the commonwealth and the prisoner at the bar, whether he neglected and refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so by the act of God." The jury found he did so "by the act of God." Whereupon he was remanded to jail. But in the case before us, the judge did not see proper to test the prisoner's sanity, by any preliminary inquiry to ascertain whether he was capable of pleading to the indictment—he did plead, and a trial and conviction was the result. Although we are of opinion that the facts disclosed in the bill of exceptions, might well have warranted the preliminary inquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court. If, amid the mystery and veil which shrouds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken, and try an insane man, (as we incline to think has been done in the case before us,) it will present a case in

which there may be a strong appeal to executive clemency. We cannot, from the record, see that error, such as we can judicially notice, has been committed. The judgment of the circuit court is therefore affirmed.

REYNOLDS v. McCLURE & WILSON.

1. A plea in abatement of a pending suit, commenced by attachment, is bad, unless it alledges that the attachment was levied. The allegation that the attachment is still pending, is not sufficient.

Writ of Error to the Circuit Court of Cherokee.

THIS was an action of debt at the suit of the defendants in error, on a bill single. The defendant pleaded two several pleas in abatement—1. That previous to the institution of this action, the plaintiffs caused an attachment to be issued against his estate for the same cause of action, returnable to the county court of Cherokee, which was still pending and undetermined. 2. The second plea is similar to the first, save only that it alledges the attachment was returnable to the circuit court. The plaintiffs demurred severally to these pleas, and their demurrer being sustained, the defendant declined to plead further, and judgment was rendered by *nil dicit*.

WOODWARD, for the plaintiff in error. The pleas not only contain matter of abatement, but were properly pleaded. 1 Bac. Ab. tit. Abate. 28; 7 Ala. Rep. 601; 10 Id. 958; 3 Chit. Plead. 903.

COLLIER, C. J.—There can be no question but the de-

defendant's pleas are unexceptionable in point of form, if they are good in substance—in fact, are framed in accordance with the most approved precedents. The question then is, do they disclose such matter of defence as would authorize the abatement of the plaintiffs' suit. In *Dean v. Massey*, 7 Ala. Rep. 601, it was held that an attachment sued out, returnable into a court of record having jurisdiction of the case, when levied and returned, is the commencement of a suit, and may be pleaded in abatement to a suit subsequently instituted for the same cause. And in *Brown v. Isbell*, 11 Ala. Rep. 1019, we said, "an attachment is extraordinary process, and when levied and returned, becomes a suit in court."

In the case at bar, the pleas alledge the suing of the attachment, when, by whom, and to what court returnable, but do not state that it was ever levied or returned, otherwise than it may be inferred from the allegation that it is still *pending*. Great strictness is necessary in pleas in abatement, and even defects in matters of form are available on general demurrer; they cannot be sustained by inference or intendment, but their allegations must be full, direct and complete.

Where an action is brought in the ordinary mode, by writ requiring personal service on the defendant, if the process is returned "not found," the plaintiff may sue out an *alias* writ in order to bring the defendant in; but where an original attachment is the leading process in an action, if no levy is made, it becomes *functus officio*, and its vitality is as effectually lost, as if a formal entry of discontinuance were made. It has been said the *lis pendens* in chancery which affects a purchaser with notice, so as to prevent him from acquiring a title to the prejudice of the litigants, begins from the service of the *subpoena* after the bill is filed. 1 Johns. Ch. R. 566; 8 Ala. R. 570. Whether the service of the writ in a case at law is necessary to the creation of a pending suit, we will not inquire; for however this may be, an attachment which is returned, without having been levied, has spent its force, and cannot be made the basis of any farther proceeding. The

pleas then are defective in not alledging the levy and return of the attachment, so as to show the legal *pendency* of the suit, although the term to which it was returnable had passed by before the present action was commenced. Consequently, the demurrers were rightly sustained, and the judgment must be affirmed.

POWELL v. WRAGG & STEWART.

1. The possession of personal property, obtained by a fraudulent contract, with one indebted at the time, will not ripen into a title by force of the statute of limitations, against the creditors of the vendor.

Writ of Error to the Circuit Court of Tallapoosa. Before the Hon. S. Chapman.

TRIAL of the right of property. The defendants in error levied an execution on slaves, as the property of David Powell, which were claimed by the plaintiff in error, and bond given to try the right. In the progress of the trial, a bill of exceptions was taken to the ruling of the presiding judge, which presents the following facts: The plaintiff in execution read to the jury, the execution levied on the slaves, against David Powell, issued from the circuit court of Macon county. The judgment on which it was issued, was rendered in Macon circuit court in April, 1839, on which execution had issued to Macon county, and was returned no property. The sheriff was examined by the plaintiffs, who testified that he levied on the slaves at the house where the defendant in execution and his family resided. It was proved that David Powell was the father of the claimant, and that the slaves

have been in Tallapoosa county since May, 1839; that David Powell and his family have resided on a tract of land in Tallapoosa since 1839, except during the year 1841, during which year, the claimant acted as overseer for a gentleman in Macon county, but his family resided in Tallapoosa. The defendant in execution was shown to have been insolvent since 1839. The claimant is an unmarried man, and is about twenty-nine years old. It was shown that said David disclaimed being the owner of the land on which he and his family resided since 1839, and has admitted it to be the property of the claimant. It was shown that the slaves levied on, have lived at the same place where David Powell and his family resided, ever since the date of a bill of sale from David Powell to the claimant, which bears date in May, 1839, and was executed by the defendant in execution, David Powell, to the claimant his son, and conveys five negroes, mules, wagon, &c. and expresses to be in consideration of \$3,100; but the claimant, ever since the date of the bill of sale, either by himself, or his overseer, who was his younger brother, has had the control of the slaves, and David Powell, the defendant in execution, has disclaimed all right to, or control over them. That during the years 1839 and 1840, the claimant himself had possession of the slaves, and made a crop with them, and since then, through his overseer, his younger brother, who has had control of said slaves, and who resides on the same place, and lives in the same house where David Powell and his family reside. That since 1840, his younger brother has been in the employment of claimant, at \$150 per year, but as yet nothing has been paid to him; he is now twenty-seven years old. The claimant, since 1840, has followed the employment of an overseer, and since then has paid debts for his father, the defendant in execution, to the amount of ten or twelve hundred dollars. There was no evidence that the plaintiffs had notice of the sale, unless notice could be inferred from the fact, that nothing had been realized from the judgment on the control of the negroes by claimant as aforesaid. There was evidence tending to show, that the negroes were delivered to claimant, by the defendant in execution, at the date of the execution. On this evidence, the court charged the jury, that if

they believed the sale from David Powell to the claimant was fraudulent in its inception, that time would not purify it, and that the statute of limitations of six years would not defeat the plaintiff, notwithstanding that period had elapsed since the sale.

The counsel for the claimant requested the court to charge the jury, that if they believed that the plaintiffs in execution had notice of the sale, that then the statute of limitations of six years would defeat them, if more than six years had elapsed before the levy of the execution; which charge the court refused; and the charge given, and the refusal to charge, are assigned for error.

RICE, for the plaintiff in error, made the following points:

1. The common saying, that the statute of limitations is not a bar, where there is a fraud or a trust, is a mistake. All actions within the statute, are barred by it, both at law and in equity. *Smith v. Bishop*, 14 Verm. Rep. 110; *Hamilton v. Sheppard*, Adm'r, 3 Murphy's Rep. 115; 17 Wend. 202; 20 Johns. Rep. 33; 5 Wend. 30; 3 Littell, 183; and many other authorities. A claim to personal estate, is barred at law, no matter how imposing it may be. *Johnson v. Johnson*, 5 Ala. 90; 1 Ala. 653.

2. Even in those States, where no chancery jurisdiction exists, separate from a court of law, an action founded on a fraud, or a deceit, is barred by the statute. 9 Picker. 240; 3 Greenl. 405. And it is immaterial, whether the claimant's deed, or purchase, is fraudulent or not; the statute commenced running from the time the right to levy on the slaves existed. 4 Adolph. & Ellis, 519; 3 Iredell, 481.

3. A conveyance originally fraudulent, may become valid by matter *ex post facto*. 2 Ala. 181; 5 Id. 324; 3 Metc. 332; 12 Mass. 140.

4. Possession of slaves in this State, under a claim of title, not only bars an action for their recovery, but vests the absolute title to them in the possessor. 2 Ala. 555; 1 Cowper, 218; 1 Ala. 650.

HOPKINS and JONES, contra.

1. There is no question but the sale was fraudulent; and

the possession of such a fraudulent vendee, is not an adverse possession against the vendor. Roberts Fraud. Conv. 595-6; 10 Johns. 232-3; Ballentine on Lim. 374.

2. A sale made with a fraudulent intent is incapable of confirmation. 4 S. & R. 483; Rob. Fraud. Conv. 494-5.

3. The procedure, called a trial of the right of property, is not barred by any statute. It is a remedy given to the claimant to protect his property from sale.

DARGAN, J.—On a trial of the right of property levied on, and claimed by a stranger to the execution, the only issue is, whether the property is subject to the execution; hence the statute of limitations can never be invoked on such a trial, unless for the purpose of showing an indefeasible right in the claimant to the property; or by the plaintiff in execution, to show that the title of the claimant is divested, and vested in the defendant in execution, by the uninterrupted possession of the chattel, adversely to the title of the claimant, for a period of time that will, by statute, give title.

The statute of limitations, when applied to real estate, or to personal property, operates not only by way of barring the remedy for the recovery thereof, but acts directly on the title, and vests in the possessor, when his possession has been adverse, and uninterrupted, for the space of time required by the statute, an indefeasible title. See 2 Ala. R. 561; Shelby v. Gay, 11 Wheat. 361; Brent v. Chapman, 5 Cranch, 358. Hence it would follow, that if the title of the claimant depended on his possession, and this had been adverse to the title of the defendant in execution, and this possession had continued for a time sufficient to bar the defendant of all remedy for the recovery of the slaves, before any *lien* was created on them, the title of the claimant would be absolute, and indefeasible to the slaves. The defendant, by virtue of his title, could not recover them, or divest the title of the claimant; nor could a creditor of his, or any one else that claimed by, or through, or in consequence of the title of the defendant in execution. But this is not the character of the claimant's title; he claims the slaves by virtue of a fraudulent bill of sale, executed by the defendant in execution, in fraud

of the rights of the plaintiffs, as creditors. 'This title is void as to the creditors, and the claimant seeing this, he now attempts to set up title by the statute of limitations ; for it is very certain that time will not purify the fraud in the original purchase ; but he says, although my purchase was fraudulent and void, I have a good title by the statute of limitations, as against the defendant in execution, and therefore a good title as against you. It therefore becomes necessary to examine into the character of his possession. The slaves have remained on the plantation where the defendant in execution and his family have resided, from the time of the pretended purchase until now. A younger son living with the family, and in the same house, has had control of them ; as yet he has never received a dollar from his brother for his services. The claimant does not show that he has received the proceeds of the labor of the slaves, or that their labor, or their product on the farm, does not go to the support of the family of the defendant in execution ; or that the slaves do not serve the defendant in execution since the sale as they did before the sale. Leave then the bill of sale out of view, and look to the title of the claimant, as founded on his possession, for a time sufficient to bar the right of the defendant in execution, and we see the slaves yet with the defendant in execution ; in fact, at the house he and his family live at. How is his family supported ? Who receives the profits of the labor of the slaves ? The claimant does not inform us, and therefore it is but reasonable to presume, that the slaves yet serve the defendant and his family.

Such a possession cannot be the foundation of a title by the statute of limitations ; therefore there is no error in the charge given, or in refusing to give the charge requested. The judgment of the circuit court is consequently affirmed.

COLLIER, C. J.—The second section of the statute of frauds enacts, that every gift, grant, or conveyance of lands, tenements, hereditaments, goods or chattels, &c., by writing or otherwise, had, or made, and contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, shall be,

from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, successors, executors, administrators or assigns, and every of them, whose debts, suits, demands, &c., by such guileful and covinous devices and practices as is aforesaid, shall, or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use, or any other matter, or thing, to the contrary notwithstanding. Clay's Dig. 254, § 2. This enactment explicitly declares, that every "gift, grant, or conveyance" made with the intent to delay or defraud the creditors of the grantor, shall be utterly void; and this whether the transaction be written or merely oral. Here is language too plain to be misapprehended. If then, the gift or grant is wholly inoperative, a consequent possession can derive no aid from it. Such possession must be referred to the authority under which it originated, and if this be a nullity, the possession will have no foundation upon which it can rest; and no matter how long continued, cannot change the character of the donor's or grantor's possession, or prejudice the creditors' rights. So far as it concerns the creditor, the debtor may still be considered as continuing in the possession, and the voluntary or fraudulent grantee cannot call to his aid the statute of limitations, so as to give himself a title in despite of the express provisions of the statute. In this view, it is immaterial whether the defendant in execution, or claimant, was in possession of the property in question, from the time of the transfer, as the plaintiff, by the claimant's possession for more than six years previous to the levy, cannot be defeated. I am therefore for affirming the judgment of the circuit court.

CHILTON, J., not sitting.

BURK'S ADM'R v. JONES & ALLEN.

1. Where a creditor, by *scire facias*, seeks to subject lands to the payment of a judgment rendered against the intestate in his lifetime, a plea *puis darrein continuance*, that since the issuance of the *sci. fa.* the estate has been declared insolvent, &c., is a good bar.
2. The lien of a judgment upon the real estate of a deceased debtor, is destroyed by his death, and upon the declaration of the insolvency of the estate, before judgment on *scire facias*, subjecting the land, the estate vests in the administrator, for the purpose of paying all the debts *pro rata*.

Writ of Error to the County Court of Marengo.

THIS was a proceeding at the instance of the defendants in error, by *scire facias*, to subject certain lands to the payment of a judgment rendered in their favor, in the county court, for the sum of \$81 79, rendered against one Wood F. Monk in November, 1839. That since the rendition of the judgment, and after execution had been returned by the sheriff to the next succeeding term, indorsed by the sheriff, "no property found," said Monk departed this life seized of the land now sought to be subjected by the *sci. fa.*

The defendants appeared, and the administrator of Monk pleaded *puis darrein continuance*, the insolvency of the estate, in bar to the relief sought by the *sci. fa.*, to which plea a demurrer was sustained.

It appears from the plea, that the estate was declared insolvent after the *sci. fa.* had issued. The county court proceeded to give judgment subjecting the land to the satisfaction of the judgment.

BROOKS & BYRD, for the plaintiff in error.

1. A *sci. fa.* is the commencement of a suit, and the decree of insolvency vests the property in the administrator for the benefit of creditors, to be distributed *pro rata* among them. See Clay's Dig. 192, § 2; Clarke v. West. 5 Ala. R. 117.

2. The judgment for costs should have been certified to the orphans' court. Clay's Dig. 195, § 13.

The court cannot render a judgment by default against an infant, and should have called a jury to ascertain the facts of the case.

The costs should have been given against the guardian *ad litem* of the heir, and not against the administrator.

J. W. HENLEY, for defendants in error, made the following points :

1. Under the operation of our various statutes, (Clay's Dig. 199, § 1; Ib. 202, § 4; 205, § 17,) judgments are held to create a lien on the lands of a defendant in execution, from the date of its rendition, (Morris v. Ellis, 3 Ala. Rep. 560,) and that such lien is co-extensive with the State. Campbell, use, &c. v. Spence et al. 4 Ala. Rep. 543.

The lien of the judgment is a substantial right. It is the right to compel the collection of his debt out of the lands of the defendant by execution and sale. It is *a right*, valuable, of which the plaintiff cannot be deprived without his consent, or some fault on his part. The lien of the judgment on the defendant's land, is as ample and binding as that of the execution, after its delivery to the sheriff.

Where an execution has been placed in the sheriff's hands in the lifetime of a defendant, its lien is not destroyed by his death, if executions are regularly issued from term to term. Collingsworth v. Horn, 4 S. & P. 237; Fryer, adm'r, v. Dennis, 3 Ala. Rep. 254; Boyd, adm'r, v. Dennis, 6 Ib. 55. Why should the lien of the judgment on the land be any more destroyed by the defendant's death?

If the lien has become perfect, the courts are bound to enforce it. All they have any right to ask, when seeking their aid, is, has he a lien?

The lien of an attachment is only an inchoate lien—imperfect and incomplete—and therefore not binding. Such a lien is lost by the report of insolvency. Hale, adm'r, v. Cummings & Spiker, 3 Ala. Rep. 398.

But the reason given why the lien of the attachment was lost by the report of insolvency, was, that it could not be

completed by a judgment. Could it have been completed by a judgment, the lien would have been preserved, and would have dated back to the levy of the attachment, notwithstanding the report of insolvency.

The right to the *sci. fa.* is based upon the insufficiency of the personal estate to pay the debts of the deceased. It presupposes the insolvency of the estate. Clay's Dig. 197, § 27. •

2. The next error complained of, is clearly a clerical error, i. e. that a judgment for costs was rendered against the administrator personally. As the error might have been amended in the court below, the court will not reverse for this, except to render here at the cost of the plaintiff in error.

To show that it was a clerical error, see *Yarborough's Ex. v. Scott's Ex.*, 5 Ala. Rep. 221; *Johnson v. Gaines*, 8 Ib. 791; *Oliver v. Hearne & Whitman*, 4 Ib. 271; 3 Ib. 205.

And that it will be rendered here, see *Oliver v. Hearne & Whitman*, 4 Ala. 271.

CHILTON, J.—No objection is urged to the form of the plea *puis darrein continuance*, and we are called upon to decide whether it interposes a good bar to the further prosecution of the *scire facias*. In the case of *Fitzpatrick, et al. v. B. & W. Edgar*, 5 Ala. Rep. 499, it is said, “a lien is not an absolute, but a qualified right, given by law, or created by the act of the parties, by which real or personal property is charged with the payment of a debt or duty, and that a lien on land, in virtue of a judgment, being merely a right to charge the land with the payment of the judgment, may be waived or lost by the laches of the party entitled to enforce it—so a lien created by law, may be taken away by law,” &c. In the case from which we make this quotation, the estate was declared insolvent, *before* the judgment creditor sued out his *scire facias*. The court seem to lay some stress upon this fact. “The plaintiff,” it is added, “might have enforced his lien by selling the lands of the decedent, if he had thought proper to do so, but he has lain by until the administrator has reported the estate insolvent, which by operation of law, divests the estate out of the heirs at law, and vests the same in the administrator, for equal distribution.” By our statute,

no preference is given to judgment creditors over others in the satisfaction of their demands out of insolvent estates. Each creditor, except for last sickness and funeral expenses, is to share *pro rata*. Clay's Dig. 194, § 12; 192, § 2. If a lien has attached, such as may be enforced by execution, after the death of the intestate, such right to satisfaction is not divested by the declaration of insolvency. But when the judgment creditor cannot have execution of his judgment without the aid of the court, by *scire facias* against the heirs and personal representatives, if the estate, in the mean time, has been duly declared insolvent, the court will refuse its aid, and remit the party to the orphans' court to share *pro rata* with the other creditors. This view seems to harmonise with the previous decisions of this court, and accords with the spirit of our legislative enactments on the subject. It is true, as contended for by the defendant's counsel, that the judgment creates a lien on the real estate of the debtor, and which is co-extensive with the State. Campbell, use, &c. v. Spence, et al. 4 Ala. Rep. 543. But allowing the lien to exist in the lifetime of the debtor, the question is, how is this lien affected by his death? Upon the death of the judgment debtor intestate, the land immediately descends to his heirs. Their title cannot be divested without a proceeding instituted for that purpose, and to which they must be made parties, so that they may show cause against the divestiture. See Lucas v. Doe ex dem. Price, 4 Ala. Rep. 679. In Mansony and Hurtell v. U. S. Bank, et al. 4 Ala. Rep. 735, this court, in a very elaborate investigation of the authorities upon the point now under consideration, indicate in strong terms, that an execution issuing after the death of the defendant, is, as it respects his lands, a nullity. See the authorities collected in that case. This may now be regarded as the settled law. See Abercrombie v. Hall, 6 Ala. 657. We have no statute saying a judgment shall be a lien on land, but it is held, the lien attaches by virtue of the statute authorizing their extension under the writ of *elegit*. See Morris v. Ellis, 3 Ala. Rep. 560; Campbell, use, &c. v. Spence, *supra*. If then the lien is dependent upon the right which the judgment creditor has, to have the land extended, can it survive that right? It is clear that it cannot, and as we

have seen that the right to an execution, and of consequence an *elegit*, is destroyed by the death of the party defendant in the judgment, it follows that the lien of the judgment is also gone. See *Bank of the U. S. v. Winston's ex'rs*, 2 Brockenb. Rep. 252 ; 2 Call's Rep. 125 ; 4 Hen. & Munf. Rep. 57 ; 1 Brockb. 170. Upon the same principle, the giving an injunction bond destroys the lien. It deprives the party for the time being, of his right to an execution, or *elegit*, for its satisfaction. The cases referred to by the defendant's counsel of *Collingsworth v. Horn*, 4 S. & Por. 237 ; *Fryer v. Dennis*, 3 Ala. Rep. 254 ; and *Boyd, adm'r, v. Dennis*, 6 Ala. Rep. 55, do not militate against this view. These cases merely decide, that where execution has been sued out in the lifetime of the debtor, and regularly kept up without the chasm of an intervening term, a lien upon the personal property created by the execution being placed in the hands of the officer, is preserved after the death of the defendant. The error consists in not taking the distinction between *personal estate bound by the executions* regularly kept up, and real estate, bound by the judgment by virtue of the *right of satisfaction by elegit*, which right, as against the debtor, is destroyed by his death—so, while the execution is permitted to continue as to the personalty, the judgment does not survive as to the realty. *Woodcock v. Bennet*, 1 Cow. 740. It follows, that the heirs take the title to the land discharged of the lien of the judgment, but charged with the payment of all the ancestor's debts, and as in this case, it becomes assets in the hands of the administrator for the payment of the debts of the estate, upon his report of insolvency, which report was made before the judgment subjecting the land to the satisfaction of the plaintiff's demand, such judgment was erroneous.

It is unnecessary to examine the other points raised in the argument, as what we have said is decisive of the case. Let the judgment of the county court be reversed, and the cause will be remanded, if denied, that the defendant in error may take issue upon the plea of insolvency.

THE STATE v. CROWLEY.

1. The wife of M, having gone to live in the family of C, the former remarked to the latter that his wife had ruined him, and would ruin C, to which C replied, she had to live somewhere, and he would not turn her away. Held, that this admonition, had no tendency to establish, that there was an illicit connection between C and the wife of M.
2. The suspicion, or jealousy of the wife, of one indicted for adultery, cannot be adduced as evidence against him.
3. Acts occurring eighteen months after the finding of an indictment for adultery, and not connected with other acts, occurring within the time laid in the indictment, cannot be given in evidence, though tending to prove an illicit connection.
4. The party with whom the adultery is charged to have been committed, is a competent witness for the other party. The degree of credit to be given to the testimony, is a question for the jury.

On points referred from the Circuit Court of Lawrence, by the Hon. G. W. Lane.

THE defendant was indicted as a married man, for living in adultery from the first day of January, 1844, to the first day of September of the same year, with Jane McMichael, a married woman. A verdict assessing a fine of \$100 was rendered against the defendant, and judgment was rendered accordingly. The points reserved as novel and difficult may be thus stated: 1. The husband of Mrs. McMichael was examined as a witness for the State, and testified that in August, 1843, his wife went to live in defendant's family, upon which occasion he remarked to the defendant that she ruined him (witness,) and would ruin defendant; to which the latter replied, she had to live some where, and he would not turn her away. Witness knew of no other acts tending to show illicit intercourse, and the testimony was admitted, though the defendant moved its exclusion. 2. Mrs. McMichael was living in the defendant's house at the time of the trial, and her husband was asked upon his examination, for the purpose of proving the charge in the indictment, if he knew the state of feeling between his own and the defend-

ant's wife, and allowed to answer the question in despite of an objection by the defendant. 3. Another witness, to whose testimony the defendant objected, testified to acts tending to show illicit intercourse between the defendant and Mrs. McMichael, eighteen months after the finding of the indictment; and this, although these acts were not connected with other acts occurring within the time laid in the indictment. 4. On the objection of the solicitor, Mrs. McMichael, who was introduced as a witness for the defendant, was excluded; although she was sworn, and said she was willing to testify to his innocence of the charge alledged in the indictment.

ATTORNEY GENERAL, for the State.

T. M. PETERS, with whom was L. P. WALKER, for the defendant in error, cited Arch. Cr. Plead. 27; Clay's Dig. 431, § 3; 469, § 1; 1 Stew. & P. Rep. 208; 1 Ala. Rep. 442; 6 Id. 390; 4 Port. Rep. 321; 8 Id. 511; 1 Greenl. Ev. § 11, 12, 13, 40, 41, 44, 51, 52, 53, 54, 379; 2 Id. § 47; 14 Pick. Rep. 518; 22 Id. 397; 10 Conn. Rep. 372; 2 Yeates's Rep. 466; 1 Camp. Rep. 473; 1 T. Rep. 296; 1 Hagg. R. 376; 2 Id. 318.

COLLIER, C. J.—The premonition of the husband of Mrs. McMichael, and the response of the defendant to him, upon her going to live in the family of the latter, does not in itself tend to establish the charge of adultery; and we cannot very well perceive how it could be connected with other evidence, so as to assist in proving the fact. It cannot be inferred from the witness's assertion, that his wife had ruined him and would ruin the defendant, and the answer of the latter that she must live some where, and he would not drive her from his house, that the defendant was guilty of the offence charged. Merely looking at these facts, and we can see nothing from which a criminal intent can be deduced—his purpose in receiving Mrs. McMichael into his house, may have been as his language would import, the dictate of benevolence. The evidence then did not tend to make out the defendant's guilt—it was irrelevant, calculated to divert the inquiries of the jury, to excite their prejudice and mislead

them, and should therefore have been excluded. 1 Greenl. Ev. § 52.

2. In respect to the second point, the defendant's guilt cannot be predicated of the state of feeling existing between his wife and Mrs. McMichael. The latter may have been offensive to the wife, either because of her unamiable disposition, her supposed want of chastity, or other cause having no reference to a suspicion of an illicit intercourse between the defendant and herself. But conceding, as it is altogether possible, that Mrs. Crowley suspected and even asserted that Mrs. McMichael was guilty of an adulterous connection with her husband, her suspicions and assertions would not be evidence against him. This must be so upon the plainest principles of law—if not upon the ground that the wife cannot in such a case give evidence against her husband, certainly the evidence should be excluded because the declarations were not made in court under the sanction of an oath. 2 Greenl. Ev. § 40, *et post*, shows what evidence is admissible to prove adultery.

3. Although adultery is alledged to have been committed *within a limited period of time*, the evidence is not necessarily to be confined within that period; proof of anterior acts may be adduced in explanation of other acts of the like nature within that period. 2 Greenl. Ev. § 47. So, where criminal intercourse is once shown, it must be *presumed*, if the parties are still living under the same roof, that it *still continues*, notwithstanding those who dwell under the same roof are not prepared to depose to the fact. *Id.* § 43. The fact may be inferred from circumstances that lead to it by fair inference as a necessary conclusion; what are such circumstances, cannot be laid down universally. They may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight in themselves, but which may have an important bearing upon the particular case. The only general rule, says *Lord Stowell*, is, that the circumstances must be such as would lead the *guarded discretion of a reasonable and just man*, to the conclusion that the offence had been committed. He adds, "the facts are not of a technical nature: they are facts determinable upon

common grounds of reason ; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasoning upon such subjects. Upon such subjects, the rational and legal interpretation must be the same." 2 Hagg. Cons. Rep. 2, 3. *Again:* It has been said the rule requires that there should be such *proximate circumstances* proved, as by former decisions, or in their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed. 1 Hagg. Cons. Rep. 299. Thus we see that adultery need not be shown by positive and direct evidence, but may be inferred from collateral facts or circumstances satisfactorily proved, which are coincident with guilt, and seem naturally to exclude every other hypothesis. Taking these tests as our guides, and it is difficult to perceive how the criminal conduct of the defendant and his supposed paramour within the period laid in the indictment, can be inferred from disconnected acts occurring eighteen months afterwards? Mere isolated acts at such a distance of time, certainly do not establish a premise from which a party may be presumed to be guilty of a high offence against moral and municipal law. They throw no light upon the past, however significant they may be in respect to the future.

4. It is said to be a settled rule of evidence, that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. But the degree of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. 1 Greenl. Ev. § 379, 380. It follows from this statement of the law, that Mrs. McMichael was a competent witness, and should have been allowed to give evidence for the defendant. The circuit court ruled the law incorrectly on each of the points referred. Its judgment is consequently reversed, and the cause remanded, that the defendant may be again tried, unless he be otherwise legally discharged.

YARBOROUGH v. HOOD.

1. If, in answer to the usual concluding interrogatory put to a witness, to state any thing he may know favorable to the party taking his deposition, he discloses material matter, bearing on the question touching which he is examined, it cannot be rejected, on the ground that such answer was not specially called for. But if the answer could exert no influence upon the decision of the question, or point submitted to the jury, it may be rejected by the court.
2. When the plaintiff is offered as a witness under the statute, he cannot be confined to the statement merely, that the account, or each item of it, is just; but may prove all the facts and circumstances connected with it. When the defendant is offered as a witness, he is confined to a denial of the whole, or a portion of the statement of the plaintiff.
3. Parol proof of the entry of land, is not admissible, unless a sufficient reason is shown for admitting the secondary evidence.

Writ of Error to the County Court of Randolph.

THIS suit was commenced before a justice of the peace, and after judgment thereon was rendered, it was removed to the county court of Randolph. The facts, so far as they are necessary to be shown, may be thus stated. The plaintiff in error examined two witnesses, upon interrogatories, and the last interrogatory exhibited to the witnesses was, "state all you know that will benefit the plaintiff, as fully as if you were thereto specially interrogated." One of the witnesses, in reply to this interrogatory, stated facts that the defendant objected to, on the ground that they were not responsive to the interrogatory. The facts stated in reply to this interrogatory, were, that the witness had conversed frequently with the defendant, about the contract, and the settlement, and that the defendant agreed, as he had not paid the plaintiff any interest on the four hundred dollars, which amounted to about eighteen dollars, that he was willing to pay plaintiff for his improvement on the public land, and also to move off of the land he had agreed to purchase, and

he did move off in the early part of 1844; and witness never heard the defendant say a word against complying with his contract until August, 1844. The motion was sustained, and this answer was suppressed.

The plaintiff was then offered to prove the correctness of his account, and the counsel for the plaintiff proposed to examine him as to all the facts and circumstances touching each item of the account; but this the court refused to allow, and would only permit him to be asked if each item was just; to this the plaintiff excepted. The defendant was then sworn to controvert the oath of the plaintiff, and the plaintiff proposed to examine him as to the facts and circumstances of each item of the account, but this the court refused, and would only permit him to be asked if the items were just, or unjust; which was excepted to.

The defendant then introduced witnesses to prove, what the witnesses examined on interrogatories, had said about the defendant, in the year 1845, and what was the state of their feelings towards him; to this the plaintiff objected, but the objection was overruled. The testimony tended to show, that in 1840, the plaintiff sold the defendant a tract of land, and that in the latter part of 1842, or the first of 1843, this contract was rescinded, and at the time of the rescission of the contract, the plaintiff rented to the defendant the farm, and also sold him some improvements on a piece of public land, adjoining the farm. A part of the plaintiff's account was for a part of the public land above alluded to, which was sowed in wheat. The defendant offered to prove by parol, that a part of the public land sowed in wheat, was entered by one Hefflin, before the wheat was gathered; and that Hefflin took possession of it in May, with the consent of the defendant, and that from that time the defendant had recognized Hefflin as his landlord, as to the part entered by him, but had not paid rent, either to Hefflin or the plaintiff. The plaintiff objected to the admission of the parol evidence of the entry of the land by Hefflin, which objection was overruled.

The defendant served a notice on the plaintiff, to produce on the trial, a letter written by the plaintiff to the defendant, or parol evidence of its contents would be given. There was

no proof that the letter was in the possession of the plaintiff, or under his control, but there was proof to show, that the defendant had used it in evidence in another trial, between the plaintiff and the defendant, before a justice of the peace in Tallapoosa county, and the defendant being sworn, stated that the last time he had seen the letter, was on the trial before alluded to, but that he had inquired for it, and it could not be found, and he believed it was lost. The plaintiff's counsel stated on oath, that he had seen the letter on file in the circuit court of Tallapoosa county. Under these circumstances, a witness was permitted to give evidence of the contents of the letter; the plaintiff objected.

The court charged the jury, that unless the plaintiff had satisfied them, that the defendant had made an express promise to pay the plaintiff rent for the land during the time he held it, under the purchase, that the plaintiff could not recover rent for such time, although the contract was rescinded, and that an implied promise was insufficient to authorize a recovery of rent for such time. And the court further charged, in relation to the public land, that an express promise was necessary to enable the plaintiff to recover rent upon it, and that an implied promise was insufficient, although the plaintiff had sold him the improvements, and the defendant was the tenant of the United States, and not the tenant of the plaintiff. That if they believed the land was entered by Hefflin, before the wheat was gathered, and that he had taken possession of it with the consent of the defendant, the plaintiff could not recover for that portion. These charges were excepted to.

The errors assigned are—

1. The court suppressed the answer to the last direct interrogatory.

2. The court erred in not allowing the plaintiff to speak of the particular circumstances under which each item of the account was created; and in not permitting the plaintiff to examine the defendant as to the circumstances of each item of the account.

3. The court erred in permitting the statements of the plaintiff's witnesses, about the defendant, made in 1845, to go to the jury to discredit them.

4. In permitting parol proof to be given of the entry of the land by Hefflin.

5. In permitting the witness to testify as to the contents of the letter.

6. The court erred in the charges given to the jury.

FALKNER, for the plaintiff in error.

The 6th direct interrogatory is, under the practice of this State, usual, and is in itself unobjectionable. The answer to it applies to the same matters about which the witness was examined, both on the direct and cross interrogatories, and should not have been excluded from the jury.

The court should have allowed the plaintiff to have stated the *facts*, and particular circumstances in relation to his account, as this only is evidence, the court therefore erred in only suffering him to state his conclusion. The same rule applies to the defendant. The statute makes the plaintiff a *witness*. See *Moore v. Hatfield & Smith*, 3 Ala. R. 442.

The interrogatories were answered 4th July, 1846, the question in the 7th cross interrogatory relates to that time. What the witnesses may have said in 1845, was improper evidence to discredit them, they not being examined on that subject, neither time, place, persons spoken to, nor words being given in the examination. *Lewis v. Post & Main*, 1 Ala. R. 65; *The State v. Martin*, 2 Ib. 43.

The purchase of the land from the United States, by Hefflin, was a matter (if true) about which there was written evidence, parol proof was therefore inadmissible. And Hefflin taking possession of the land by the consent of the defendant, did not excuse defendant from the performance of his contract with plaintiff. *Rinaldi v. Rivers*, 1 Stew. 174; *Cloud v. Patterson*, Ib. 394, and cases noted; *Mordecai v. Beal*, 8 Porter, 529.

L. E. PARSONS, for defendant in error.

1. The answer to the last interrogatory was properly excluded, because the fact was not communicated to the defendant below, and because the answer is not responsive to any interrogatory, so as to be cross-examined.

2. The statute authorizes the plaintiff to make oath to

the justice of his account; and the defendant may controvert it in the same manner. It must then be established by the usual proof.

DARGAN, J.—The evidence of the contract for the rent of the land, if that was the foundation of the account, is set out in the bill of exceptions, in such a confused manner, and it being difficult to ascertain what influence the charge had upon the case, we shall confine ourselves to the questions arising on the rejection, and the admissions of the testimony, to which objections were made. The first objection was to the rejection of the answer of the witness (examined on interrogatories) to the last interrogatory.

The last interrogatory was, state all you know that will benefit the plaintiff, as particularly as if you were thereunto specially interrogated.

This is the usual concluding interrogatory, and the witness may respond to this, any circumstance pertinent to the controversy, and which the preceding interrogatories had not elicited—and if a witness, in reply to this interrogatory, discloses material matter, bearing on the question, touching which he is examined, it cannot be rejected, on the ground that such answers are not called for by the interrogatory. But the answer of the witness to the interrogatory, in this case, seems to be unimportant, and if it had been permitted to go to the jury, we do not see what influence it could have had, or ought to have had—we should not therefore reverse the cause for the suppression of the answer to this interrogatory; for this court will not reverse a judgment for the rejection of the the answers witnesses to interrogatories, unless those answers contain something within themselves, that would be considered evidence, tending to prove or disprove the issue, or to prove or disprove some fact or circumstance, that is material in the consideration of the issue.

2. The second assignment of error is, that the court should have permitted the plaintiff to state, when examined as a witness, all the circumstances attending each item in the account; and should also have permitted the plaintiff to examine the defendant, touching the particular circumstances of each item. The court would not allow any other question

to be put to the plaintiff, or the defendant, than the single one whether the account, and the items thereof, were just. In this the court erred. In 3 Ala. Rep. 442, the statute of 1839, which allows the plaintiff to prove his account, when it does not exceed \$100, was construed, and it was held, that the object of the statute was to make the plaintiff a witness, and as such he could be examined on interrogatories, or by deposition, under the same circumstances that would authorize the examination of any other witness. If the plaintiff is to be treated as a witness, he ought to be permitted to speak of each item of the account, and to prove all the circumstances that gave rise to it. The defendant, however, has the right under the statute, to deny all the facts stated by the plaintiff on his examination, and this denial will destroy entirely the evidence of the plaintiff, and take from it all force as evidence. See 6 Ala. 783.

But the defendant does not become a witness, nor is the plaintiff entitled to examine him as to the justice of the account, nor can he give evidence to show that it is unjust, but he has the simple right to deny on oath, all, or any portion of the facts stated by the plaintiff, and this denial destroys the statement, so far as it is denied, *made by the plaintiff, as evidence*. The county court therefore erred in permitting the question to be put to the defendant, tending to show whether the account was just or unjust. The defendant should have been confined to a denial of the facts deposed to by plaintiff.

The court also erred in permitting parol proof to be given of the entry of a part of the land by Hefflin. The best evidence of this was the certificate, or patent, if one had issued; and parol proof of the entry should not have been permitted without showing a proper reason for admitting this secondary evidence.

These errors are sufficient to reverse the judgment; and if there is error in any other portion of the record, it is difficult, from the manner in which it is presented by the record, to determine whether such error ought to have any influence in reversing the judgment; they are therefore not noticed.

Let the judgment be reversed, and the cause remanded.

SCOTT v. BABER.

1. An agreement by which B sold S certain slaves, and S by a contemporaneous agreement, covenanted not to disturb the possession of B, under the penalty of \$2,000, is in legal effect a sale of the slaves by B to S, with a reservation of the right of possession by B, during his life.
2. A deposition will not be rejected, because the clerk has made the commission returnable to a day when no court was held.
3. The objection cannot be made for the first time at the trial, that the commissioner was related to the party taking the deposition, for the purpose of suppressing it.

Error from the Circuit Court of Chambers. Before the Hon. Geo. Goldthwaite.

DETINUE by the plaintiff against the defendant, to recover nine negro slaves. The defendant pleaded *non detinet*, statute of limitations of six years, and six years' peaceable and adverse possession under claim of title in his own right, upon which issues were joined. Judgment and verdict for the defendant.

Upon the trial, a bill of exceptions was sealed, from which it appears the plaintiff read in evidence a bill of sale made by defendant, as follows: "Know all men by these presents, that I, Nathaniel Baber, of the State of South Carolina, and county of Abbeville, have bargained and sold, and by these presents, do bargain, sell and convey, unto Thomas Scott, of the State of Georgia, and county of Randolph, the following negroes, viz: a negro woman named Sealy, the boy Jacob and Lucinda, and Pleasant, he the said Scott to have and to hold the above four negroes, in fee simple, as good to all intents and purposes,—for value received of him, this 8th of October, 1812.

Signed in the presence of Robert Greer, Aaron Greer.

NATHANIEL BABER, [L. s.]"

It was further shown by answers made by the defendant to interrogatories exhibited under the statute to him by the

plaintiff, that at or about the date of the execution of said bill of sale by Baber to Scott, the latter executed and delivered to Baber his written instrument, the substance of which is stated to be, "that Scott was not to interfere with or disturb the possession of said negroes mentioned in said bill of sale, and that if he did, then he was to pay the defendant the sum of \$2,000. Plaintiff proved a demand of the said slaves the day before the suit was commenced; that the slaves sued for, but not named in the bill of sale, were the increase of the females therein named; also proved them in possession of defendant at the time of the demand, and the value and hire. There was also proof conducing to show, that there was a valuable consideration for the bill of sale, and that the instrument executed by Scott to Baber, was made contemporaneously with the bill of sale, and were in fact but one transaction.

Upon the trial, the defendant offered to read the depositions of three witnesses, who had been examined jointly. The plaintiff objected to the deposition—1. Because the commission was made returnable to the circuit court to be holden for Chambers county "on the third Monday in September next," and showed that no court was by law authorized to be holden for said county at that time. 2. Because the commissioners named in the commission, and who had taken and certified the deposition, were nephews of both plaintiff and defendant. It was shown the depositions had been in court during the term, and in the possession of plaintiff's counsel two days before the trial, and that no notice was given of the motion before it was made at the hearing.

The plaintiff, at the time of the cross-examination of said witnesses, objected to the following interrogatory, as leading, illegal and irrelevant: "State all you know, or may have heard said Scott say, that will tend to prove that he has no right to the negroes of Baber sued for, or any of them, together with every fact or circumstance that will make in favor of defendant, as if specially interrogated thereto;" the answer to which was also objected to, in which the witness states, "he was present at plaintiff's house, and heard him say 'Baber did not make his (Baber's) negroes work so as to make a support,'" &c. The court allowed the interrogatory

and answer, except the words "of Baber," which were excluded.

Other proof was made, which left the matter as to the agreement signed by Scott, uncertain as to its contents. The proof showed that the defendant had been in the possession of the slaves continuously since the date of the bill of sale.

The court was asked to charge the jury, that if they believed the instrument is truly set forth in defendant's answer, and that it was executed at the same time with the bill of sale, then, after the demand and refusal, his right of action to recover said slaves and their increase accrued, provided they find the contract has never been discharged, and that defendant had no previous adverse possession. The court refused this charge, and charged the jury, that it devolved on the court to construe written instruments. That if the defendant, in his answer to the plaintiff's interrogatories for discovery, had truly described the bond, then the proper construction was, that the defendant should not be disturbed in the enjoyment of the possession of the slaves in any event, until the time agreed on should elapse; with a further provision that the plaintiff would pay to the defendant the sum of \$2,000, in the event he did disturb him in the possession of the slaves. But that if the jury found that the instrument reserved to the defendant a life estate, plaintiff could not recover. So, neither could he recover, if the bond reserved an estate to defendant for any other defined time, until the expiration of such time. Further, that the bond disclosed in defendant's answer, did not authorize the plaintiff to demand the slaves at any time he chose, and then sue for and recover them.

The refusal of the court to exclude the evidence as shown by the bill of exceptions, and the charges asked by the plaintiff and refused by the court, as well as the charge given, are assigned by the plaintiff as error.

RICE, for the plaintiff in error, made the following points :

1. The bill of sale and instrument of writing executed at the same time, in relation to the same subject matter, must be construed as constituting but one contract. *Sewall v. Henry*, 9 Ala. R. 24.

2. The true construction of this contract is, that it vests in the plaintiff the title to the property and the right to the possession; but the plaintiff *permits* the slaves to remain in the possession of the defendant. The charge asked should have been given, and the charge given is erroneous. The permission of the plaintiff to the possession of the defendant, was merely gratuitous, and is not binding on plaintiff. Yet as it was a bailment, the plaintiff had no right of action until he made a demand. *Stewart & Pratt v. Frazier*, 5 Ala. R. 114.

3. Such a possession, acquired by the consent of the owner and permitted by him is a bailment, and however long it may be thus permitted to continue, cannot be deemed adverse, or bar the right of the owner. *Strong v. Strong*, 6 Ala. R. 345; *Livingston v. Penn. Iron Co.* 9 Wend. R. 511; *Brown v. Lipscomb*, 9 Por. 472, and cases therein cited on p. 478; *Stedman v. Reddick*, 4 Hawkes, 29; *Stogdale v. Fugale*, 2 Marsh. 136.

4. A commission to examine a witness, returnable on a day when no court is holden, or appointed to be holden, is actually void—a nullity. *Kirk v. Suttle*, 6 Ala. Rep. 679; *Brown v. Simpson*, 3 Stew. R. 331.

5. Although a party must move to suppress a deposition, before trial, when the objections are for mere informalities or irregularities, yet the rule is different as to illegal evidence, or as to objections which show the commission to be absolutely void.

ALLISON, with whom was GOODMAN, argued for the defendant.

1. The first ground of objection, made by plaintiff to suppress the depositions, was rightly overruled. The statute makes it the duty of the officer to appoint commissioners, and the legal presumption is, that they are suitable persons, and the agents of the court. *Clay's Dig.* 164, § 1, 2, 3. But if the court erred, it was upon a point in the discretion of the court, and not revisable in error. *Spence v. Mitchell*, 9 Ala. R. 741; *Cullum v. Smith & Conklin*, 6 Ala. R. 625.

The second ground of objection to suppress the deposition,

was correctly overruled. The statute does not require the officer to state the time the commission should be returned. Clay's Dig. 165, § 3. The objection was upon an immaterial point, upon a clerical mistake made by an officer in the discharge of his duty, and for whose acts, defendant should sustain no injury. 3 Stew. & Por. 397. But if error, not revisable. 9 Ala. 744; 6 Ala. 625.

The third objection to interrogatories and answers, should have been overruled, because the objection was not sufficiently specified at the time of crossing the interrogatories. Milton v. Rowland, 11 Ala. R. 732; Borland v. Walker, et al. 7 Ala. R. 269. It was legal as propounded, and did not seek a legal conclusion, but facts relevant to issue. Massey v. Walker, 10 Ala. R. 288; 7 Ala. R. 784; 1 Ala. R. 632.

The charge asked should not have been given, because the contents of the instrument disclosed in the second answer of defendant, show the contract was executory. 2 Kent's Com. top. p. 492, 495, 496; 4 Ala. R. 305; 3 Ala. R. 679; 1 Ch. Pl. 122. They also show that Baber did not hold the negroes under the plaintiff, and could not be termed his bailee. 8 Cow. 589, 597; 9 Ala. R. 789; 8 Porter, 237, 240, 241; 9 Porter, 472, 477; 2 Black. Com. top p. 367.

CHILTON, J.—The bill of sale, executed by Baber, and the instrument executed at the same time by Scott to him in reference to the same transaction, form but one instrument. This needs not the aid of legal intendment, inasmuch as the bill of exceptions informs us, that both instruments form but one transaction. 9 Ala. R. 24.

If we append to the bill of sale given to Scott, the agreement executed by him to Baber, the agreement would amount to this: a sale by Baber of the slaves in suit to Scott, with an agreement on Scott's part not to disturb the possession of Baber under the penalty of \$2,000. What is the effect of such an agreement? Did not the bill of exceptions show that a consideration was paid by the vendee to the vendor of the slaves, the fact that he stipulates not to disturb the possession of the vendor, would strongly incline the mind to the belief that this was merely a colorable arrangement between the parties, by which they sought to vest the apparent legal

title to the slaves in the vendee, while the vendor should in fact remain the owner. We are not, however, under the facts presented, authorized to place this construction upon the agreement, but in the absence of proof explanatory of the nature of the transaction, and showing the intention of the parties, we must, from the agreement itself, deduce its legal interpretation.

The first general principle in the construction of all contracts, whether verbal or parol, or under seal, is so to expound them as to carry into effect the intention of the parties, and this intention is to be collected from the whole agreement. *Watts, Ex'r, v. Sheppard*, 2 Ala. R. 425; *Ely, use, &c. v. Witherspoon*, 2 Ib. 131; *Read v. Edwards*, 7 Por. R. 508; 2 *Bov. Bac. Ab.* 576. If the terms of the contract be doubtful, it must be construed most strongly against the party who stipulates, lest by the obscure wording of his agreement, he should find means to evade it. *Evans v. Saunders*, 8 Por. R. 497. Again: The court will take care so to expound the instrument as, if practicable, to give efficiency to every part of it. *Platt on Con.* 145. Applying these general principles to the case at bar, let us ascertain the legal effect of the agreement executed and delivered by Scott, the purchaser of the slaves to the defendant—"that he (Scott) was not to interfere with or disturb the possession of said negroes, mentioned in said bill of sale, and that if he did, then he was to pay the defendant the sum of \$2,000." If the reservation of the possession of the slaves to Baber, the grantor, is to be considered without limitation, then it would be utterly inconsistent with the estate created by the conveyance of the slaves to Scott, and, considered as a part of the agreement by which the estate is created, and being a condition, in this view of the case, *repugnant* to the estate, it would be void. It is held that a condition upon a feoffment in fee not to alien, is void because it is repugnant to the estate. *Co. Litt.* 223; 2 *Bac. Ab.* (Bouv. ed.) 301. So, if a man makes a feoffment in fee, provided that the feoffor shall have the profits, the condition is void. *Co. Litt.* 206. But, as the parties intended the contract to be operative, and we must sustain it if not inconsistent with the law, the above construction, which renders it nugatory and invalid, is consequently not the cor-

rect interpretation. Neither is it true, as contended for by the counsel for the plaintiff, that the possession was barely permissive, and without consideration. This view is opposed to the concession of the counsel, that the two agreements, contemporaneously executed by the parties, in reference to the same subject matter, form but one contract. 9 Ala. R. 24. The effect of the contract is a sale of the slaves, reserving to the vendor the possession. The agreement of Scott that he will not disturb, or interfere with the possession, does not amount to a sale, but is an acknowledgement that he merely purchased the title without the right to the immediate possession.

The only construction which we can give this contract, and which will accord with the general rules above laid down, is, to consider it a purchase by the plaintiff of the slaves in controversy, reserving to the defendant the possession of them *during his life*, and at his death, (if the contract be otherwise *bona fide*,) the plaintiff will be entitled to possess them. This construction gives effect to the agreement, and upholds the respective stipulations of the parties. The defendant, by the execution and delivery of his deed, conveyed to the plaintiff his right to the property; the plaintiff agrees he will not in any way interfere with or disturb the defendant's possession. The defendant, having parted with the title, none can be transmitted to his representatives after his death, and retaining only the right of possession, this ceases with his capacity to hold. The contract, then, vests the property in the plaintiff, postponing his right to possession until after the death of the vendor. That such contracts will be sustained, see *Banks, adm'r, v. Marksberry*, 3 Litt. R. 275; *McCutchen, adm'r, v. McCutchen*, 9 Por. R. 650; *Sewall v. Glidden*, 1 Ala. Rep. (N. S.) 52; *Myers v. Peek's adm'r*, 2 Ib. 648; *Oden v. Stubblefield*, Ib. 684; *McRae, adm'r, v. Pegues*, 4 Ib. 158; *Wilkes v. Greer*, at the present term.

It is manifest from what we have said, that the charge asked of the court by the counsel for the plaintiff, was properly refused, and that the charges given were equally as favorable to the plaintiff as the law will authorize.

The remaining point relates to the testimony which was

objected to, but allowed by the court. It is insisted that as the commission to take the testimony was made returnable to a day when no court was holden, it must be considered as a nullity, and that the deposition taken by virtue thereof should have been suppressed. We have no statute which authorizes this conclusion, and it would be most inconvenient in practice, to permit the misdirection of the clerk to the commissioners as to when they should have the deposition before the court, (and which could not injure any one except the party who seeks to use the testimony,) to defeat the ends of justice by excluding the proof. We think the insertion of the time when the court is to be holden in the commission, may be regarded as surplusage, and that it would be quite sufficient, had the clerk required the commissioner to return the commission to his office with all convenient speed. The cases of *Kirk v. Suttle*, 6 Ala. R. 679, and *Brown v. Lipscomb*, 3 Stew. R. 331, relied upon by the plaintiff's counsel, bear no analogy to the case at bar. In the first case, the commission was issued to one person, and executed by another—the other, was a case in which the original writ of *capias ad respondendum* was made returnable to a time when no court was holden. The distinction between such writ, and a commission, is too obvious to require illustration.

The court also very properly refused to suppress, because the commissioner was related to the parties. If the plaintiff could have availed himself of such objection in the manner he proposed in the court below, it is perfectly clear, that the commissioner being equally related to both plaintiff and defendant, any bias which might be presumed to result from relationship, must be regarded as balanced, and he stands equally indifferent, as though he were related to neither. Motions to suppress depositions, which have been taken according to the requisitions of the statute, are considered as within the sound discretion of the court, and when sprung for the first time, at the trial, should never be allowed, as their effect is to take the opposite party by surprise. *Cullum v. Smith & Conklin*, 6 Ala. Rep. 625; 7 Ib. 851; 9 Ala. Rep. 744.

The question objected to as leading, and which was in

part allowed by the court, we do not think objectionable. It certainly does not suggest to the witness the answer which he is to make. See 1 Greenl. Ev. 481; 1 Stark. Ev. 149.

From what we have said, it follows there is no error in the record, and the judgment of the circuit court is affirmed.

KIRKSEY v. PRYOR.

1. In actions against a sheriff for failing to serve process of garnishment on a supposed debtor of the defendant in attachment, the judgment recovered by the plaintiff in the attachment suit, is evidence *prima facie* of the injury sustained, without producing the note on which the judgment was founded.

Writ of Error to the Circuit Court of Greene. Before the Hon. J. D. Phelan.

THIS was an action on the case, at the suit of the defendant in error, to recover damages of the plaintiff, for the failure, as sheriff, to serve a garnishment placed in his hands, on Robert Leachman, a supposed debtor of G. B. Ross, against whose estate the plaintiff below had sued out an attachment. The declaration alledges, that the cause of action against Ross was a promissory note, states the proceedings thereon, and avers the recovery of a judgment against him by the plaintiff.

On the trial before a jury, the plaintiff did not produce the promissory note described in the declaration, but he laid before them the judgment recovered by him in the action against Ross. Thereupon the defendant prayed the court to charge the jury, that they must find a verdict in his favor, as the plaintiff had failed to adduce the note described in his declaration. But this charge was refused, and the jury were instructed that the attachment and judgment offered in evi-

dence, were sufficient proof of the debt to sustain the present action, if it were otherwise maintainable. To the ruling of the court the defendant excepted; and a verdict and judgment being returned for the plaintiff, a writ of error has been sued to this court.

J. B. CLARK, for the plaintiff in error, cited 2 Stark. on Ev. 740, (ed. of 1834;) 2 Chit. Pl. 737, (note f.;) 2 Esp. R. 477; 5 Id. 160.

W. COLEMAN, for the defendant in error, cited 2 Ala. Rep. 393; 17 Wend. R. 543; 1 Saund. R. 481.

COLLIER, C. J.—In an action against an officer for neglect of duty, on mesne process, the rule as to damages is, the amount of injury sustained, and not the amount of the debt. 9 Conn. Rep. 379; 5 Mart. Rep. N. S. 125; 5 Watts & Serg. Rep. 455. But in an action for any default or neglect of duty by the officer, which seems to have occasioned the loss of a debt, the judgment in the suit against the debtor is *prima facie* evidence of the measure of the injury which the plaintiff has sustained. Such evidence may, however, be controlled, and the officer in mitigation of damages may prove any facts which show that the creditor has suffered nothing by his default or neglect—as the inability of the debtor to pay, or fraud or collusion in obtaining the judgment. 2 Mass. Rep. 526; 10 Id. 470; 2 Greenl. Rep. 46; 1 Conn. R. 347; 5 N. Hamp. Rep. 438; 5 Har. & J. Rep. 485.

Perhaps these principles are not controverted in the present case, but it is insisted that as the declaration alleges the indebtedness of the defendant in the attachment to have been evidenced by a promissory note, it was necessary for the plaintiff to have produced it on the trial of this cause. If the declaration had not gone farther, and stated, that in the suit on the note a judgment was recovered, we would be inclined to think that the argument was well founded, but the allegation as to the judgment being direct and special, it was quite enough to entitle the plaintiff to recover, to produce the

attachment and judgment. This is indicated by some of the cases cited, and not denied by any we have seen. What is said in the declaration as to the note, may be stricken out as superfluous, and a good cause of action still appear on the pleadings—being thus unnecessarily stated, it was not indispensable to prove it. The circuit court laid down the law in conformity to this view, and its judgment is therefore affirmed.

DRIVER v. CLARKE & GIVENS.

1. A bond conditioned to make title to land, on the payment of the purchase money, is an equity merely in the vendee, which cannot be sold by execution at law against him.
2. In such a case, a bill may be filed by the vendor, against the vendee, to enforce the equitable lien, for the payment of the purchase money, without making the purchaser of the interest of the vendee, at sheriff's sale a party, though he is in possession of the land, unless it be shown that he is connected with the equitable title sought to be foreclosed.

Before the Hon. W. W. Mason, Chancellor.

THE facts of the case sufficiently appear in the opinion of the court.

L. E. PARSONS, for the plaintiff in error, made the following points :

The bill and amendment charge, the land was held by Clarke under a bond for titles, from Driver, when the purchase money should be paid. The bill is taken for confessed as to Clark, and Herndon disclaims all interest, except as tenant for Givens.

Givens admits in his answer to the original bill, that he purchased this land at sheriff's sale, under an execution against Clarke : and in his answer to the amended bill, that

he has got the bond for titles from Driver to Clarke—that he obtained it from Mrs. Clarke.

The proof shows the note and signature to be in the handwriting of Clarke, and that Clarke said, while in possession of the land, he gave the note for it ; and that it was due, and ought to be paid.

1. The court should have permitted complainant to dismiss his bill as to Herndon and Givens, because the relief prayed for could be decreed against Clarke, and the complainant would then be left to his remedy against H. and G. They would not be prejudiced by this. A clear case is shown against Clarke. *Harris, et al. v. Carter*, 3 Stew. 238 ; 1 Smith's Ch. Pr. 313.

The fact that the entire allegations of the bill were not proven as against Givens and Herndon, affords no reason for refusing a decree against Clarke, as to whom the case is made out. *Marr's Ex. v. Southwick, et al.* 2 Porter, 351 : *Bumpass v. Webb*, 4 Ib. 65.

It is insisted, that as G. and H. hold under Clarke, they are not necessary parties, or if necessary, they, as privies in estate, are effectually concluded by the evidence which is shown against Clarke.

RICE and A. J. WALKER, contra, cited *Batre v. Auze's heirs*, 5 Ala. Rep. 173 ; *Erwin v. Ferguson*, Id. 158 ; 40th Rule Ch. Practice.

DARGAN, J.—The bill alledges, that the complainant was seized of an undivided half of the north-east quarter of section 28, township 14, range 8, in the Coosa land district, the other half belonging to James Clarke. That on the 13th April, 1837, he contracted to sell his interest to said Clarke, for fifteen hundred and twenty dollars, to be paid on the 25th December next thereafter, with interest from date ; and that Clarke executed his note to the complainant accordingly, and complainant executed to said Clarke a bond for titles, in the penal sum of \$3040, conditioned to make titles to the said Clarke, on the payment of the purchase money.

The bill then avers, that the purchase money was unpaid, except about \$600 ; that Clarke has removed from the State, and has still said bond for titles. The bill further alledges, that Givens and Howard are in possession of the land, and claim by purchase from Clarke.

Howard answers, that he is the tenant of Givens, without further interest, and has no knowledge of the facts stated in the bill.

Givens answers, denying all knowledge of the contract as alledged in the bill. Avers that the land was sold under execution, as the property of Clarke, in 1841 ; that he became the purchaser of said land, that is, the entire quarter section, and by virtue of his deed, he had obtained the possession.

The complainant filed an amended bill, in which he alledges, that he was mistaken in stating that Clarke yet retained the possession of the bond, and alledges that the defendants, Givens and Howard, or one of them, have it in their possession. Givens in answer to this admits that he received the bond from the wife of Clarke, or from her father, but it was after his purchase at sheriff's sale, and after the purchase of the right of dower of Mrs. Clarke, and that he did not know of the existence of the bond, as described in the bill until after his purchase ; but that he has lost or mislaid it, and that after searching for it, he cannot find it. The bill was taken *pro confesso* against Clarke, he having failed to answer. The signature of the note was proved, and one witness stated, that he held the note for collection, and that Clarke admitted it was given for land.

These are the material facts presented by the record, and the first question is, are the allegations of the bill proved as against Givens. There is no proof made by the complainant, that he was in fact seized in fee, nor that the note was given for the land. The only proof consists in the admission of Givens, of his answer to the amended bill ; that he received the bond described in the bill from the wife of Clarke, or from her father. This is the only proof against Givens, that Clarke ever accepted the bond from the complainant. We think this admission within itself, taken in connection with the answer of Givens, that he knew nothing

of the contract, and unsupported by any other proof, is insufficient to prove the allegations as against him.

The next question is, can a decree be rendered against Clarke, (the bill as to him having been taken as confessed,) and dismissed as to Givens. The solution of this question, depends on the fact, whether Givens is a necessary party to the bill, not whether he might be made a party; but whether a decree could be rendered in favor of the complainant, against Clarke, without making Givens a party to the bill.

The allegations of the bill are, that complainant and Clarke being jointly seized in fee, he contracted to sell his interest to Clarke, received a note for the purchase money, and gave Clarke a bond to make titles, when the money was paid. That only about \$600 have been paid. The answer and proof of Givens, is, that he purchased the land at sheriff's sale, since the date of the contract, as alledged in the bill. What interest did Clarke take in the land, by virtue of his contract? Not the legal title, but a mere equity, which would entitle him to the legal title, when the purchase money was paid. Can such an interest be sold under execution at law?

In 17 Johns. Rep. 351, it was determined, that where one contracts to sell land, and part only of the purchase money is paid, the vendee has a mere equitable interest, that cannot be sold by execution at law. To the same effect see first Yerger, 1. These decisions were made, notwithstanding the statute of uses in those States executes the use, and subjects the interest of *cestui que use*, to levy and sale. But by our statute of 1820, (Clay's Dig. 350,) it is provided that the equitable title, or claim to land, or other real estate, shall hereafter be made liable to the payment of debts, by suit in Chancery, and not otherwise; and in conformity with this statute, this court has decided, that a mere equitable title cannot be levied on, and sold by execution. *Davis v. McKinny*, 5 Ala. R. 729.

It is very clear, that a bond for title, before the purchase money is paid, gives nothing more than a mere equity, and this interest cannot be sold by execution at law. The object of the bill is to foreclose that equity, which is still vest-

ed in Clarke, and which was not divested by the sheriff's sale, nor any title or interest therein conveyed to Givens.

Then, although he is in possession, he is not connected with this equitable right, that is sought to be foreclosed, and instead of holding in connection with this equitable title, he seems to hold adversely to the plaintiff, and not in connection with any title derived from the plaintiff. Under these circumstances, I think a decree may be rendered against Clarke, without making Givens a party to the bill. This decree will cut off the equity of Clarke, unless he pays up the purchase money, and will leave the complainant with his legal title, which he now has according to the allegations of his bill, which he may assert as he sees proper. The chancellor therefore erred in dismissing the bill, as against Clarke. The bond for titles should have been decreed an equitable lien, the amount of the purchase money remaining unpaid ascertained, according to the practice of courts of chancery, and a final decree rendered.

The decree therefore dismissing the bill as to Clarke, is reversed, and the cause remanded; and it is ordered, that the defendant, James Clarke, pay the costs of this court.

BRANCH BANK AT MOBILE v. RUTLEDGE AND WATTS.

1. If a defendant in chancery, omits to move the chancellor, to dismiss the bill for not having been filed in the proper county, he cannot assign it for error in this court.

Error to the Chancery Court for the 20th District. Before the Hon. J. B. Clarke.

THE bill was filed by defendants in error, perpetually to enjoin a judgment against them in favor of the bank, rendered in the circuit court of Mobile county. The bank, after due service of subpœna upon the president, failed to make defence, whereupon a decree *pro confesso* was rendered against it, and finally, a decree was pronounced, granting the relief sought for by complainants.

DAVIS, for plaintiff in error, relied on the case in 8 Ala. R. 224, to show the want of jurisdiction.

CHILTON, J.—The case referred to by the counsel for the plaintiff in error, and several other decisions of this court, are conclusive to show that a bill to enjoin a judgment should be filed in a court of chancery where the judgment was obtained, and cannot be exhibited elsewhere, unless the party interested in the judgment will allow the litigation to be had in another county, and if such bill be filed in an improper county, it will be dismissed *on defendants' motion*.

In this case, however, the defendant to the bill made no motion to dismiss, and permitted the court to proceed without any objection. The bank must be considered as having waived the objection which it now for the first time makes. The chancery court had jurisdiction of the subject matter of the complaint, but merely exercised it in the wrong county. This was a matter which the court was not bound *mero motu* to notice, and which the defendant below could waive, and did waive by failing to raise the objection in that court. See *Freeman v. McBroom*, 11 Ala. R. 943.

Let the decree be affirmed.

GREENLEE v. GAINES.

1. When a fraud has been committed upon a vendee in the sale of land, by the false representation of the vendor, that he had title, when he had none, the vendee may resort to chancery for a rescission of the contract, and a return of the purchase money paid, against the representatives of the vendor, without a delivery of the possession, the vendor having died insolvent.
2. A party who fails in the assertion of a good legal defence, or omits to make it at law, may, notwithstanding, avail himself of an independent ground of equitable relief.

Writ of Error to the Court of Chancery sitting at Livingston. Before the Hon. A. Crenshaw, Chancellor.

THE case made by the bill is substantially as follows:— In 1836, the complainant purchased of Thos. Ware, a certain tract of land, and received his bond for titles. Complainant paid part of the purchase money, and gave his note for the residue, which was transferred by Ware to Jesse Duren, and notice of the transfer given to the complainant. Ware represented his title to be good, and in 1838 executed a deed for the land, which was accepted by the complainant. A short time previous to this, the defendant sued out an attachment against Ware, and summoned the complainant as a garnishee, who acknowledged in his answer, that he had made the note above referred to, but stated that Ware had absconded, and died insolvent, having first transferred the note to Duren, to whom, under the advice of counsel he paid it. On the trial of the issue upon the answer of the garnishee, the deposition of Duren was rejected, and a recovery was had against him for the sum of \$803 33. It is alledged that the title to the land which Ware thus sold and conveyed to the complainant, never was in the former; but at the time of the contract of sale, and ever since, has been in the United States; and no one else has any claim or right there-

to. The bill prays that the judgment in favor of the defendant be enjoined, and for general relief.

Upon a motion to dismiss the bill for want of equity, the chancellor was of opinion—1. That as there was no offer to rescind the contract and restore the possession of the land to Ware, nor any excuse for the omission, the bill was defective. 2. That all the supposed matters of equity, if true were available at law, and that any error or irregularity which occurred upon the trial there, should be corrected by a revising court. The bill was consequently dismissed at the complainant's cost.

M. F. Horr, for the plaintiff in error, cited 1 Dan. Ch. Pr. 434, notes; 1 Stew. & P. Rep. 107; 2 Ala. Rep. 108; 3 Id. 251; 4 Id. 37; 5 Id. 604; 9 Id. 772; 10 Id. 702.

F. S. Lyon, for the defendant in error, cited 1 Stew. Rep. 81, 490, 532; 1 Ala. Rep. 622; 5 Id. 90, 604; 9 Port. Rep. 434.

COLLIER, C. J.—In *Duncan v. Jeter*, 5 Ala. Rep. 604, it was said, that if the vendee wishes to rescind a contract for the purchase of land, he must, if money be due, offer to pay, and in addition put the vendor in *statu quo*, by abandoning the possession to him. But it was added, that circumstances might exist which would relieve the vendee from a compliance with the latter requisition. As where the vendor was insolvent, and unable or unwilling to make the title; in such case, the possession might be retained as the only means of reimbursement for money paid on the purchase. The case of *Young v. Harris*, 2 Ala. Rep. 108, was cited as one under which relief was granted under circumstances of that description, though the vendor did not renounce the possession. In *Elliott, et al. v. Boaz, et al.* 9 Ala. Rep. 772, the law is laid down in terms quite as broad and decisive. See also *Cullum v. Br. Bank at Mobile*, 4 Ala. Rep. 21, and the citations there made to this point.

The allegations of the bill are direct and explicit, that Ware, at the time of the contract with the complainant and subsequently affirmed the validity of his title; the latter

purchased under the impression that this affirmation was true, and that he was acquiring land, in the enjoyment of which he could not be disturbed. If this representation was false, and known by the vendor to be so, as the bill indicates, it is difficult to conceive a case of more unmitigated fraud. The death and insolvency of Ware are charged, and the failure to yield up the possession thus sufficiently excused. In this view of the case, the complainant has an unquestionable right to come into equity for a rescission of the contract, and relief against his vendor's representatives, so far as it can avail him. The payment of the purchase money cannot preclude him; for it would seem, that at the time he made the payment to Duren, he was not informed of the defectiveness of Ware's title; and if he had possessed such information, he may have chosen to pay the money rather than submit to a suit, with the intention of afterwards seeking indemnity from his vendor.

The payment of the complainant's note to Duren, or any other matter of which he could have availed himself on the trial at law, will furnish no ground for equitable relief against the defendant. But the defendant must be considered as occupying a position altogether as favorable as if the complainant had made no resistance to the recovery of his judgment; and upon this hypothesis the case may be considered. In *Reynolds v. Dothard, et al.* 7 Ala. 664, it was objected to the jurisdiction of chancery, that the record of the suit in which the judgment enjoined, had been recovered, discovered an irregularity which would be fatal to the judgment in a direct proceeding. This court conceded, that equity could not relieve against a judgment, if the defence could have been made at law, and the legal remedy was unembarrassed. But we stated that we were not aware of any case in which the rule has been carried so far as to repudiate a bill, because the record of the case at law discovered an error, for which the judgment was reversible, although the case stated was one, of which, independent of this ground, the jurisdiction of equity was unquestionable. The principle adjudged in that case, is this, if a party fails in the assertion of a good legal defence, or pretermits a defence at law, he may avail himself of an independent ground of equitable relief. Here

the complainant was unsuccessful in resisting a recovery by the defendant, though according to his own showing, the law could have afforded him an ample protection; and any complaint founded upon this ground, we have seen must be placed entirely out of view.

The want of a title in Ware was no ground upon which the plaintiff could have gainsayed a recovery, either in an action on the note, or in a proceeding by garnishment—the fact that he was in possession of the land, and his contract still unrescinded, would have precluded such a defence. But we have seen the defect of title in Ware, especially when coupled with his fraudulent representations, authorized the complainant to resist the payment of the purchase money, and ask a rescission of the contract. What we have said will show, that the omission of the complainant to interpose with success, as he might have done, a defence to a garnishment, by which a creditor of Ware sought to recover a part of the purchase money, will not prejudice an independent ground of relief in equity. In asserting this ground, which assumes the invalidity of the contract, resists the payment of the money unpaid, and asks the re-imbursement of what has been paid, an injunction may be made to reach not only the vendor, but his assignees, either in fact or by operation of law. The defendant comes within the latter designation.

We do not think it necessary to consider whether the bill is not defective for the want of proper parties; for, however this may be, the equity of the bill is not affected, and it should not have been dismissed *upon the motion*, for any supposed defect in this particular. The bill can be perfected by bringing all necessary parties before the court. It results from what we have said, that the decree must be reversed and the cause remanded.

WATSON v. ANDERSON.

1. Though the opinions of medical men, are entitled to more weight on the trial of a cause involving the question of sanity, than that of those who are not physicians, yet it is the duty of the jury to weigh the whole evidence, and if satisfied that the testator was sane, should so find, although the medical men examined, were of a different opinion.

Writ of Error to the Orphans' Court of St. Clair.

THIS was a proceeding before his honor John I. Thomason, in the orphans' court of St. Clair, to try the validity of the will of William Watson, deceased. The cause was submitted to a jury, on the issues made up between the contestants, and the executor, who propounded the will for probate. The first plea, or objection interposed by the contestants, was, that the testator was not of sound mind. 2. That the will was procured by fraud, and undue influence. 3. That the testator was of unsound mind, resulting from age, bodily infirmity, and the intemperate use of ardent spirits. The 4th plea amounts to the same in effect as the second.

On the trial, a bill of exceptions was sealed by the judge, which presents the following facts: On the trial, it was agreed that all the witnesses, as well those who were not physicians, as those who were, should give their opinion as to the sanity, or insanity of the testator, with the facts on which their opinions were founded.

The executor requested the court to charge the jury, that if upon a full view of all the facts of the case, and all the evidence, and the opinion of the witnesses, those not physicians, as well as those who are, as to the sanity of the testator, they believe the said testator was of sound, and disposing mind, then they must find the will valid, although four, out of five of the physicians, gave it as their opinion that the deceased was not of sound mind. This charge the court gave, and the contestants excepted. The court had before charged, that if the will was obtained by undue influence, by Ander-

son taking advantage of the condition of the testator, resulting from age, infirmity, and intemperance, then the will was void. The verdict was in favor of the validity of the will, and judgment being rendered, a writ of error is brought to this court.

RICE, for plaintiffs in error.

1. Where several issues are formed on the contest of a will, and the issues are different, and upon those issues being submitted to a jury, "there was conflicting proof as to all the issues joined,"—it is erroneous for the court to give a charge to find the will valid, if they found only one of those issues against the contestants.

2. The error of such a charge is not cured, by the fact that "in the previous part of the charges of the court, but not in connection with the charge excepted to, the court had charged the jury in a less objectionable form, and in relation to another issue." The last charge given may be taken by the jury, and ought to be taken as a recantation of "the previous part of the charges."

3. When there are several different and material issues submitted to a jury, in the case of a contested will, and the last portion of the charge makes the whole case to turn upon one of those issues only, (to wit, sanity or insanity,) this court will reverse the judgment at the instance of the contestants, without indulging in conjectures as to the effect of the charge, especially when the attempt to cure the error of such a charge, discloses that another charge was given which is clearly erroneous, in this, that it confined the investigations of the jury as to undue influence, to Anderson alone, whereas under the issues, the undue influence of any other person would have been as fatal to the alledged will, as the undue influence of Anderson.

WOODWARD, contra.

The whole charge given by the court must be taken together. The court had given the charge that testator must have been of sound mind and free from undue influence, and it cannot be presumed that the jury would reject this instruction and adopt the one excepted to.

The charge, as asked by Anderson, and given by the court, was correct in itself, because one is not of sound and disposing mind in legal contemplation, if his mind is operated upon by undue influence.

But if these positions are untenable, then it devolved upon the party excepting, to ask the court to explain the apparent conflict in the charges, and having failed to do so, there is no ground for a reversal. 9 Ala. 452.

DARGAN, J.—The instructions given by the court, were entirely correct, and appropriate to the evidence, and the issues submitted to the jury. The issues, in substance, are but two. The first, as to the sanity of the testator; second, whether the will was obtained by undue influence. The court, charged, in substance, that if it was obtained by undue influence, exercised over a weak, and infirm old man, it was void. Secondly, that if the jury believed from the whole evidence, the testator was of sound mind, they should find in favor of the validity of the will, notwithstanding four, out of five of the physicians, gave it as their opinion, the testator was not of sound mind. It is true, that the opinion of medical men, on the trial of a question of sanity, is entitled to more weight, than the opinion of a witness, who is not a physician. Yet it is the duty of a jury to weigh the whole evidence, and if they are satisfied, that the testator was of a sound and disposing mind, they should so find, although the physicians who may have been examined, gave it as their opinion, that the testator was insane.

Let the judgment be affirmed.

ADAMS, AND WIFE, v. BARRON, ADM'R.

1. When dower is assigned, out of adjoining lands, lying in contiguous counties, the party at whose instance it is done, cannot afterwards complain that the court had no jurisdiction to make an allotment out of the county.
2. A return of the sheriff, that he has assigned dower to the widow, "as shown by the annexed return," is sufficient, as it will be presumed, that the return annexed, is the report of the commissioners.
3. A designation of the tracts allotted as dower, by their designation at the land office, is sufficient, without describing them by metes and bounds.
4. An assignment to the widow, and putting her in possession, is sufficient, though she has a husband.
5. Notice of the time of the confirmation of the report of the commissioners, is not necessary. If injured by such confirmation, a motion should be made in the same court to set it aside.

Error to the Orphans' Court of Perry County.

THE plaintiffs in error filed their petition in the orphans' court of Perry county, claiming dower in certain lands described in said petition, in right of said Lucy Ann Adams, who was the widow of James B. Tutt, late of Perry county, deceased, and who, since the death of her late husband, had married the said Benjamin H. Adams.

The facts of the case sufficiently appear in the opinion of the court.

BROOKS & BYRD, for the plaintiff in error, cited 10 Ala. R. 455; 6 Ala. R. 219; Clay's Dig. tit. Dower.

JOHNS and GRAHAM, for defendants, cited Aik. Dig. 2d ed. 613, § 1; Johnson v. Neal, et al. 4 Ala. R. 166.

CHILTON, J.—This was an application, by plaintiffs in error, to the orphans' court, by petition, praying the allotment of dower in right of Lucy Ann Adams, widow of James B. Tutt, late of Perry county, deceased, who, since the death of her late husband, had married the said Benjamin H. Adams.

The lands out of which dower is claimed, are particularly described by their numbers as designated in the survey of the United States. The petition asserts, that though some twenty-five tracts are named, they all form but one farm, and lie in one body, but the line between the counties of Perry and Dallas divides the farm. We are not advised by the petition, what lands lie in one county and what in the other, nor do any of the proceedings had in the orphans' court disclose this fact. A writ was issued by the court according to the prayer of the petitioners, and the sheriff of Perry county executed the same, according to its mandate, by the appointment of five commissioners, who allot the dower to the widow, and make return of their proceedings to the said court. The sheriff also returns substantially the facts at large, as reported by the commissioners, who certify that after the allotment, they put the said Lucy Ann Adams into possession of the part thus allotted her for her dower. The court confirmed the action of the commissioners and sheriff, and decreed the dower accordingly. Adams and wife assign for error in this court, 1. That by the writ to the sheriff of Perry, he was required to assign dower in Perry and Dallas counties. 2. To allot dower to Lucy Ann Adams, instead of to her and her husband. 3. That the wife only, and not the husband, was placed in possession of the land allotted. 4. That it does not appear in what manner the sheriff has executed the writ, or in what county the lands lie in which dower is assigned. 5. That the commissioners do not allot by "metes and bounds," but merely by numbers; and 6. That plaintiffs in error had no notice of the time when the report of the commissioners would be confirmed by the court.

The case before us presents the singular anomaly of a party complaining at the action of a court, in granting the relief prayed for by them, and which, so far as the record discloses, did not in any manner contravene their wishes.

It is unnecessary for us to inquire whether, if the decedent had lands adjoining, and constituting but one tract, which intersected by a county line, the orphans' court of either county, under our statute might not allot the dower. It is a sufficient answer to the objection raised by the plaintiffs in error, that they asked the court so to make the allotment.

Besides, it does not appear that any portion of the lands set apart for the widow were without the county of Perry. If they were, and the plaintiffs in error sustained any injury by the supposed want of jurisdiction, they should have moved in the orphans' court for its correction, and if that court had refused their application, the petitioners might well have applied to this court for redress.

The return of the sheriff, we think altogether sufficient. It sets forth the names of the commissioners selected by him—that they were sworn, and that they proceeded to assign and set apart the dower “as shown by the [his] annexed return.” The return alluded to, we may fairly presume, was the report of the commissioners. This bears date prior to the sheriff's return, and follows in consecutive order in the record, an entry in which recites, that the sheriff's return certified to the court the action of the commissioners under the writ.

The description of the land contained in the report of the sheriff and commissioners made to the court, is a sufficient compliance with the statute requiring the commissioners to set off the dower by metes and bounds. The numbers of the tracts are given as designated by the United States survey, and for all practical purposes, this is as certain and definite as though the boundary had been defined by natural objects.

That the assignment was not made to both the plaintiffs, and that the widow of the deceased was put into possession instead of her husband, if erroneous at all, were not errors that plaintiffs can avail themselves of. The petition prayed the court to allot the dower to Mrs. Adams, and the statute is express that the commissioners shall put the widow in possession. Clay's Dig. 173, § 5.

We need hardly resort to the legal fiction, to determine that the possession of the wife is the possession of the husband. He certainly has a right to enter upon the land, and cannot therefore complain.

The statute under which the plaintiffs made their application, does not require that they shall have notice of the time when the report of the commissioners will be acted on by the court. It declares, “the proceedings upon such petition for dower shall be in a summary way, and the court shall at

their first term when such petition is filed, proceed to hear and determine as to them shall seem just and right ; provided the petitioners give notice," &c. If plaintiffs in error were injured by the confirmation of a report of the commissioners under which they are placed in possession of the land, they should have moved in the orphans' court to set aside the confirmation. In any aspect in which we can view this case, we are satisfied there is no error of which the plaintiffs in error can be allowed to take advantage. 4 Ala. R. 166.

Decree affirmed.

BROWN v. BROWN.

1. Upon issue joined on the plea of *non detinet*, it is not admissible to prove the determination of the plaintiff's interest, since the issue was joined. Such testimony is only admissible under a *plea puis darrein continuance*. Nor can the fact be given in evidence, to restrict the recovery of damages.

Writ of Error to the Circuit Court of Greene. Before the Hon. G. D. Shortridge.

THIS was an action of detinue at the suit of the defendant in error, for the recovery of a slave named Charles. The cause was tried on the plea of *non detinet*, a verdict returned for the plaintiff, in which the value of the slave, with damages for his detention, were assessed, and judgment entered in usual form. On the trial, the defendant excepted to the ruling of the court. It appears from the bill of exceptions, that evidence was adduced by the plaintiff, tending to prove that about the middle of November, 1828, Charles was delivered to him by Sarah Rainey, in the State of South Carolina, and that the plaintiff took possession in despite of an objection by her husband to such delivery. In that State, the statute

of limitations applicable to personal property was four years, and after the expiration of that period, the plaintiff carried Charles to Mississippi, where he was forcibly taken by the defendant from his possession on the 1st March, 1836, and detained up to the time of the trial. The plaintiff demanded the slave previous to the institution of this suit; but his demand was refused.

The defendant then offered and proved a deed of gift, in consideration of natural love and affection, from Thomas and Sarah Rainey to himself, for the slave in question. This deed purports to have been made in South Carolina, on the 12th December, 1836, and conveys an estate to the donee for the life of Mrs. Rainey.

Sarah Rainey was the mother both of the plaintiff and defendant, was the widow of John Brown at the time of her marriage with Thomas Rainey—her maiden name was Sarah Ussery, and the daughter of John Ussery, who died in Virginia. John Ussery made his will, in which he made the following bequest to his daughter, then Mrs. Brown, viz: "I lend unto my daughter Sarah Brown, my negro boy Frank, and my negro woman Jenny, and all her children to my said daughter during her natural life; and at her death, the said negroes and their increase to be equally divided, among all her children or their heirs." Charles was a child of the woman Jenny. This will was dated the 24th November, 1803, and admitted to probate in 1804. Sarah Rainey died in 1844, leaving five children by her husband John Brown.

The defendant prayed the court to charge the jury—1. That the plaintiff could not recover the slave Charles, because by the death of Mrs. Rainey previous to the trial, the right to him vested in her children. 2. That the plaintiff was not entitled to recover hire for Charles after the death of Mrs. Rainey in 1844. These charges were severally denied by the court.

Thereupon the court charged the jury—1. If the plaintiff acquired possession of the slave in question by the consent of the mother, but against the wishes of her husband, and held him for four continuous years in South Carolina, he acquired

a title not only against Rainey and wife, but all the world, until the death of Mrs. Rainey.

2. If the plaintiff became thus invested with a title, and the slave was wrongfully and illegally detained from his possession by the defendant, no subsequent sale or gift from Rainey and wife, could affect the plaintiff's right; nor would the death of the wife after the wrong had been committed, prevent a recovery in this action, *at least under the plea of non detinet.*

W. M. MURPHY, for plaintiff in error, cited 1 Stew. Rep. 536; 7 Ala. Rep. 9; 11 Id. 609; 2 Mass. Rep. 509; 2 Hay. Rep. 186; 4 Dev. Rep. 70.

J. ERWIN, for the defendant in error, cited Gilmer's Rep. 341; 1 Dev. & Bat. Rep. 234; Co. Litt. 283; 1 Chit. Plead. 113; 1 Saund. on Pl. & Ev. 434.

COLLIER, C. J.—This cause was before this court at a previous term, (5 Ala. Rep. 508,) and we then held, in conformity to what was before said in Goodman v. Munks, 8 Por. Rep. 84, that, where personal property has been held adversely in one State for a period beyond that prescribed by its laws as a bar to its recovery, and the possessor afterwards removes into another State, which has a larger period of prescription, the original holder cannot successfully assert a title in the latter State. It was proved at the trial that the statute bar to an action for a chattel is four years in South Carolina, and that the plaintiff retained the possession of Charles in that State under a claim of right. This was quite sufficient to give him a title as against those who had a present right of action—that is, against Thomas Rainey. But in respect to those who were entitled to the slave upon the death of Mrs. Rainey, the plaintiff's title by prescription would not operate. These conclusions are not now controverted, nor is it contended that one joint owner of a chattel may maintain an action against another; but the questions necessary to be considered are—1. Could the defendant defeat a recovery *under the issue*, of the slave or his alternate value, by proof that after the pleadings were made up, him-

self, the plaintiff and others, had become joint proprietors of the slave by the death of a person in whom a life estate was vested? 2. If the form of the issue will prevent the defendant from defeating a recovery of the slave or his value, may he not show the death of Mrs. Rainey, and avoid damages for the detention since that time?

1. In Coke upon Littleton, 283, it is laid down, "if the defendant plead *non detinet*, he may give in evidence a gift by the plaintiff, for that shows he does not detain his goods." It was said by *Gaselee, J.*, in *Philips v. Robinson*, 4 Bing. Rep. 106, "I had some doubts at first whether want of property in the plaintiff might be given in evidence on *non detinet*, but the passage from Lord Coke renders that point clear. If the defendant relies on a lien, that must be specially pleaded: but he may give in evidence under *non detinet*, that the plaintiff has no property in the thing sought to be recovered." So in detinue for slaves, parol evidence to prove that a deed by which they were conveyed, was executed for the purpose of defrauding creditors, was held admissible under the plea of *non detinet*. 2 Munf. Rep. 329. And the defendant in detinue may protect himself on the plea of *non detinet*, by proving that he and those under whom he claims, had possession of the property in controversy for the length of time which the statute of limitations makes a bar to a recovery. 4 Munf. 301.

Although it may be allowable under the general issue, to give in evidence any matter to show that the defendant does not detain the plaintiff's goods—that the latter has given them to the defendant or some third person, yet it is not admissible to adduce testimony of such matter of defence arising subsequently to the pleadings being made up.

In *Sadler v. Fisher's Adm'rs*, 3 Ala. Rep. 200, we said "there was a distinction as to a ground of defence which has arisen after issue joined, and as to matter arising pending the suit, but before plea. In the former case, the defendant must plead *puis darrein continuance*; in the latter he should show that his defence arose pending the writ, and insist that the plaintiff should not further have or maintain his action," &c. See also 1 Chit. Plead. 657, 9th Am. ed. The release of the defendant—his bankruptcy—an award, or accord and

satisfaction, &c., if occurring after issue joined, should be pleaded *puis darrein continuance*. Id. 657, 658; 15 East Rep. 622; 4 B. & C. Rep. 920; 7 Johns. Rep. 194; 5 Id. 392; 9 Id. 221; 5 Pet. Rep. 232. So, it may be pleaded in abatement, that a *feme sole* plaintiff has married, or in an action by an administrator that the plaintiff's letters of administration have been revoked *puis darrein continuance*. And a defendant sued as an executor *de son tort*, may plead that he has since obtained letters of administration, so as to support a previous plea of retainer in the character of executor. 1 Chit. Plead. 658.

In Morgan v. Cone, 1 Dev. & Bat. L. Rep. 234, it was decided, that if the plaintiff in an action of detinue gets possession of the thing sued for after issue joined, that fact may be pleaded *puis darrein continuance* in abatement of the suit; but such plea would not be good in bar. Further, in detinue damages are only consequential upon the recovery of the thing sued for; if therefore the plaintiff obtains possession of it pending the suit, he cannot proceed for the damages, but the suit fails altogether. "When a plaintiff," say the court, "brings an action of detinue, and regains possession of the thing detained, he falsifies his writ by his own act, and thereby defeats that action. It is a settled rule, that wherever the plaintiff falsifies his own writ, and this appears to the court, the writ abates," not only as to the thing sued for, but as to the damages and costs, which are a fruit or consequence of the recovery of it. "The thing detained is all that is demanded, and the damages are awarded to render the restitution complete. If the plaintiff, by his own act, destroy the *right* to restitution, there is an end to his *demand* of restitution." There is nothing in Shepard's Adm'r v. Edwards, 2 Hayw. Rep. 186, adverse to Morgan v. Cone, or to any thing we have said. The report of that case is so very brief, that it does not even inform us upon what issue it was tried, or that there was any controversy as to the adaptation of the proof to the pleading. The principles adjudged are certainly well founded.

In Austin's Ex'r v. Jones, Gilmer's Va. Rep. 341, it was adjudged, that even if the death of a slave, pending an action of detinue, could defeat the action as it respects the value,

the fact of death should be put in issue by a plea *puis darrein continuance*. Judge Brooke said, "the pleadings generally, are the best tests of the law. The plea of *non detinet* traverses the allegations in the declaration, and puts it upon the plaintiff to prove them. As to the possession in the defendant, that need only be proved, either at the suing out of the writ, or at some other time before." He adds, that this proof of possession, with evidence of the value being adduced, the plaintiff's case is made out; and it follows that any negative proof by the defendant, as to the possession after the writ, would be improper." The case of *Burnley v. Lambert*, 1 Wash. Rep. 308, decides, that "the plea relates to the time of suing out the writ, or to some previous period, as regards the possession, and not to a time subsequent." Hence the learned judge concluded, that proof of the defendant's loss of the possession "by death or otherwise, at a later period, was irrelevant to the issue." Judge Roane laid down the same principles, and for the purpose of showing that the plea of *non detinet* related to the time of the institution of the suit, he cited 1 Wash. Rep. 135; 3 Call's Rep. 248; 1 Munf. Rep. 22. And after discussing the point adds, "these principles, and these cases, then, clearly prove that the jury were limited by the pleadings in this case, to the proof of a possession, at the time of the institution of the suit, and had no right to receive evidence, or find a verdict touching the non-existence of that possession, as at the time of rendering the verdict. That was a point ulterior to the one made by the pleadings. It was not in issue, and therefore it was irregular to offer evidence in relation to it, or find it by the verdict."

These citations are direct to the point, and rest upon a foundation, which a court professing to follow the guidance of precedent cannot overturn. They very satisfactorily establish, that if the defendant would have availed himself of the consequences resulting from the death of Mrs. Rainey, he should have interposed a plea of *puis darrein continuance*, setting out the fact with appropriate allegations. Whether such a plea should be in abatement, or bar, we need not determine. But as the plaintiff had a good cause of action at the time of the commencement of his suit, and has not, in

the language of the law, falsified his writ by any act of his own, we are *strongly inclined to think* that no plea could be so framed as to prevent him from recovering damages to the extent of the hire of the slave, up to the death of Mrs. Rainey, or to throw on him the payment of the costs which had accrued when the plea was pleaded.

2. What has been said upon the first question, is altogether appropriate to the second, and if, under the plea of *non detinet*, it is not allowable to show the determination of the plaintiff's interest in the slave, after issue joined, and defeat a recovery of the slave, or his value, the defendant cannot show this fact, and thus restrict the recovery of damages. This conclusion is an obvious sequence from the principles of pleading discussed, and requires no further argument to support it.

This may be a hard case upon the defendant, and the result give to the plaintiff more than in moral justice he is entitled to recover. However this may be, we cannot accommodate the principles of law, so as to make our judgments the consummation of strict right; but if the parties will remember the relation they bear to each other, and that the golden rule requires us to *do unto others, as we would that others should do unto us*, they will have no difficulty in adjusting their differences. We have but to add, that the judgment of the circuit court is affirmed.

POPE V. RANDOLPH, ADM'R.

1. A father desiring to give his son the use of three slaves for a year, hired them to P, with directions to pay the hire to the son, which P promised to do. Held, that this was not the transfer of a *chose in action*, and that the *administrator* of the son, could maintain an action against P, for the hire.
2. When a partnership is dissolved, and upon settlement a balance found due to one of the partners, *assumpsit* will lie for the amount.

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3. P, having had the use of the slaves of S, and his personal services for a year, after the death of S, promised the father of S, to pay him \$600 for the hire and services of S. Held, that although this promise was without consideration, yet the jury might consider it, as a circumstance, showing the estimate P placed on the value of the services, and therefore not irrelevant.
4. A gift of the use, or hire of slaves for a year, the slaves being delivered to the person hiring, to consummate the gift, is complete by such delivery, and cannot be revoked by the donor.

Writ of Error to Perry County Court.

THIS suit was brought by plaintiff, as administrator of Singleton Shields, to recover of the defendant, for work and labor, money had and received, &c. The cause was tried, and a verdict and judgment was rendered for the plaintiff. In the course of the trial, a bill of exceptions was tendered to the ruling of the court, which was sealed and made part of the record; from which it appears, that the plaintiff introduced proof tending to show, that in the early part of 1839, the plaintiff's intestate, being about to leave his father's residence, and to commence business for himself, his father, John Shields, gave the use of three slaves for that year. That he took them with him, and agreed with the defendant, that the defendant should furnish three slaves, and that the intestate would superintend them, and that for the year 1839, they would cultivate a place belonging to the defendant, called the McPhail place, and would equally divide the product of the farm. That the intestate, under this contract, commenced a crop, and in June the defendant sold the place, with the growing crop, and put the purchaser in possession. That the intestate then went to the residence of the defendant, with his slaves, and he and the slaves commenced work on the plantation of the defendant, the intestate in the character of overseer, and that in the latter part of August, he died. The plaintiff then introduced proof tending to show, that soon after the death of the intestate, the plaintiff said, that he was to give the intestate \$300 for his services as overseer for the year, and \$300 for the hire of the slaves,

and that he was still willing to do so, if the slaves were permitted to remain with him during the year; and on that condition promised John Shields to pay him \$600. The defendant then introduced John Shields, the father of the intestate, who stated that he had hired said slaves to the defendant, with the understanding, that the defendant should pay the hire to Singleton Shields, his son. That said Singleton had no right to said slaves, except that the witness had given him the hire of them for the year 1839. That he did not loan, or hire, or give said slaves to Singleton Shields, but had hired them himself to the defendant, with the understanding, that the hire was to be paid to the deceased. That after the death of Singleton, the witness had directed the defendant to pay the medical bill, store accounts, &c. of said Singleton, and the defendant had done so, and had accounted to him, the father, John Shields, for the full hire of said slaves.

On this testimony, the defendant's counsel asked the court to charge the jury, that if they believed that John Shields hired the slaves to the defendant, with the understanding that Singleton Shields was to have the benefit of the hire for that year, that it was a contract between John Shields and the defendant, and conveyed to Singleton nothing but a *chose in action*, on which his administrator could not sue; which charge the court refused to give in the form asked for, and charged the jury, that if they believed that John Shields hired said slaves to the defendant, with the understanding that the defendant was to account to him, John Shields, for the hire, that the plaintiff could not recover. But if it was the understanding and agreement, that the hire was to be paid to Singleton Shields, the intestate, that the plaintiff could recover for said hire, and if they believed that John Shields had given the hire, or services of said slaves, to Singleton, the deceased, for the year 1839, and that Singleton Shields had hired said slaves to the defendant, that the plaintiff could recover. To which charge, and refusal to charge, the defendant excepted. The defendant also requested the court to charge, that if the jury should believe, that defendant and Singleton Shields were partners on the McPhail place, that the plaintiff could not recover in this suit; which

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charge the court gave, and also charged the jury, that if they believed that after the dissolution of the co-partnership, the defendant, and Singleton Shields, the deceased, had had a settlement or an agreement after the dissolution of the partnership, and that the defendant had acknowledged that he owed the plaintiff \$600 for his services as overseer, and the hire of his negroes, that then the plaintiff could recover; and that if they believed that said defendant had promised John Shields to pay him \$600 for the services of Singleton and the hire of the slaves, it was a circumstance, among others, to show the amount of the indebtedness to the said Singleton Shields.

The defendant further requested the court to charge the jury, that if they believed that the promise to John Shields, to pay him \$600 for the hire of the slaves and the services of Singleton as overseer, was made without any new consideration, that said defendant is not bound to plaintiff by said promise; which charge the court gave, with this additional charge, that the jury might consider the fact of such promise, as a circumstance tending to show the amount of the indebtedness of the defendant, to the intestate for his services, and the hire of said slaves.

To this additional charge, the defendant excepted.

The defendant then requested the court to charge the jury, that if they believed that John Shields had hired the slaves to the defendant, with the understanding, that Singleton Shields should have the benefit of the hire for the year 1839, it was an unexecuted gift to Singleton, by his father, which the father could control, and if he had assumed the control of the hire before it fell due, and had settled with the defendant for it, the plaintiff could not recover the hire in this action; which charge, in the language asked for, the court refused, but charged, that if they believed that John Shields had hired said slaves to the defendant, reserving the control of the hire, and had afterwards, and before the hire became due, made a settlement of said hire with the defendant, the plaintiff could not recover, but if they believed that John Shields had hired said slaves to the defendant, with the understanding and agreement, that said defendant was to pay

the hire to said Singleton, and in pursuance of this agreement, had delivered the possession of said slaves to said defendant, and he had received the benefit of their labor, then the plaintiff had the right to bring this suit, and recover for their hire ; to which charge the defendant excepted, and here assigns for error the charges given, and the refusal to charge as requested.

A. B. MOORE, for the plaintiff in error.

1. It is clear from the testimony of John Shields, the father of Singleton, that he hired the slaves mentioned in the bill of exceptions to B. J. Pope, the plaintiff in error, with the understanding that his son Singleton was to have the benefit of the hire. This contract therefore conveyed to Singleton Shields, or his representative, nothing more than a *chose in action*, and he could not recover for the hire of said slaves in his own name.

2. If the proof shows that Pope and Shields were partners in conducting the farm, there was no evidence on the trial that any settlement was had between them previous to the death of Shields, and no action could be maintained at law against Pope in the name of the administrator, to recover the interest of Singleton Shields in a partnership. See *Phillips v. Lockhart*, 1 Ala. Rep. 524; *Foster v. Alanson*, 2 Term, 479; 17 Johns. Rep. 80; *Holt's N. P.* 368.

As John Shields was not the legal representative of Singleton Shields, any promise which the plaintiff in error may have made to him in regard to the hire of said slaves, gave no right of action to said administrator in his own name, to recover the amount so promised.

4. It is clear from the proof in this case, that the promise by Pope to pay John Shields \$600 if he would let the slaves remain until the end of the year, if any such were made, was conditional, and on such conditions as John Shields had no right to make, not being the legal representative of Singleton Shields, and could not inure to the benefit of the said administrator, so as to enable him to sell in his own name.

GARROTT, contra.

DARGAN, J.—The charge of the court first objected to, and the charge requested, must be considered in reference to the testimony before the court. The defendant introduced proof tending to show, that John Shields, the father of the deceased, hired three slaves to the defendant, in the early part of the year 1839—that it was the understanding at the time, that the hire should be paid to Singleton Shields, who was commencing business for himself; and in pursuance of this agreement, the negroes went into the service of the defendant, and it was agreed that the defendant should pay the hire to the son, as the father, John Shields, intended the hire, or the use of the slaves for the year 1839, for his son. The son, Singleton, also agreed with the defendant to work the McPhail place, with the three slaves of his father, and the defendant was to furnish three others, and the proceeds, or product of that place, was to be equally divided between the intestate and the defendant. The defendant sold this place in June, and put the purchaser in possession, and the deceased then went to the residence of the defendant, and also the three slaves; the deceased to serve as overseer, and the slaves to serve on this farm. On this evidence, the charge requested was, that if the jury believed, that John Shields hired said slaves to the defendant, with the understanding that Singleton Shields should have the benefit of the hire for that year, that it was a contract between John Shields and the defendant, conveying to Singleton nothing but a *chose in action*, and that his administrator could not recover. The court did not give the charge in this language, but charged, that if John Shields hired the slaves to the defendant, with the understanding that he should account to John Shields, then the plaintiff could not recover; but if it was the understanding, and agreement, that the defendant should account for the hire to Singleton Shields, then the plaintiff could recover.

This charge, as given, when applied to the evidence, is correct. The rule of law is too well settled to be shaken, that a promise made to A, to pay B a sum of money, founded on a sufficient consideration moving from B to the promissor, is valid, and will entitle B to bring *assumpsit*. See

1 Ventris' Rep. 318; 2 Cooper, 443; 1 Gill & John. 488; 16 S. & R. 169; 12 Johnson, 276. This promise is nothing like an assignment of a mere *chose in action*. The defendant owed John Shields nothing, nor did he owe Singleton Shields. But the proof shows, that the father, John Shields, intended to give his son, Singleton Shields, the use, or hire of the slaves for the year 1839. That either the intestate, or John Shields, the father, made the contract of hiring, and by the terms of the contract, the hire was to be paid to Singleton, the son, who also went into the employment of the defendant, and as the evidence discloses, had the control of the slaves. John Shields, the father, parted with the possession, with the view of giving the use, or hire of them, to his son, and the benefit of their labor was received by the defendant, and he promised he would pay the son. We cannot see that there is in this promise any thing like an assignment of a *chose in action*. It is a promise founded on a legal consideration, which was, the use or labor of the slaves. To whom did that consideration belong? The testimony of the defendant showed, that the father parted with the possession of the slaves, for the purpose of giving to his son their services, or hire, for the year 1839. The consideration, then, that the defendant received for this promise belonged to the son, if the father could make a parol gift of the services, or use of the slaves for a year, to his son, and it cannot be denied that such a gift can be made. Under this proof, it is immaterial whether the father, John Shields, or the son, Singleton, made the contract of hiring; on either supposition, assumpsit might be maintained by the son.

The charge elicited by the request, that if the jury believed that the intestate and defendant were partners, in working the McPhail place, the plaintiff could not recover, is certainly not erroneous. The charge was, that although one partner could not sue his co-partner at law, yet after the dissolution, if they come to a settlement, and a balance is found due to one, that assumpsit will lie. This is too well established to need a reference to authorities. The charge was given on the supposition, that the intestate and the defendant had ascertained the amount due to the intestate for his

services, on the McPhail place. This therefore renders it unnecessary to determine, whether assumpsit for work and labor could have been maintained by the intestate, for his services on the McPhail place, if the defendant and the intestate had made no agreement as to the amount of these services, or if nothing had ever been said by either in reference thereto.

The request made, that the promise by the defendant, after the death of Singleton, to pay John Shields \$600 for the services of Singleton Shields, and the hire of the negroes, was void for the want of consideration, was given, but the court added, that the jury might look to that as a circumstance, amongst other things, in determining the value of those services.

We cannot perceive any error in this. The admissions of the defendant, as to the value of the services, would certainly be competent proof. The estimate he put on the value of the services, might be weighed by the jury, in the absence of any contract, or agreement as to the sum to be paid, in determining on the amount that the defendant should pay for those services; and as this promise was made wholly without any consideration, and had reference only to the consideration of the hire of the slaves, and the services of the deceased, it was a circumstance that might go to the jury, to show the estimate the defendant placed on the services rendered him. They might attach little or no importance to it, but it cannot be said to be irrelevant, or its admission erroneous.

Lastly—the request, that the hire of the negroes was an unexecuted gift, that the father could revoke, and that if the jury believed he had done so, and had settled with the defendant, that the plaintiff could not recover, was properly rejected.

It is true, that to perfect a parol gift, the possession must accompany the gift. See 1 Stewart & P. 56. And to divest the title of the donor, he must deliver possession of the chattel to the donee, or to some one for the donee. See 2 Ala. R. 117, and the cases there cited. But when the use, or hire of the chattel, is intended to be given, as this is not the subject of delivery from hand to hand—if the donor parts

with the possession of the chattel itself, for the purpose of the gift, it is sufficient ; for this is the only delivery that can be made of the subject of the gift.

We can see no error in the record, and the judgment is affirmed.

HINTON v. NELMS.

1. A father purchased certain slaves, paid for them with his own money, and took a conveyance of them in the name of his son, after which they were sold as the property of the father, under execution, and purchased by C. A few days after the purchase, they were secretly taken out of the possession of C, by the son, and whilst in his possession, were sold by C to N, by a conveyance, reciting, " which said slaves have been removed, or stolen from this county ; I therefore convey the chance of said slaves only, and convey such title as is in me, or all the title I ever had at any time." Suit being brought by N, against the son, Held, that this was not the transfer of a *chose in action*, unless at the time of the sale, the son was in the actual possession of the slaves, openly asserting a title, adverse to that of C : and that the title thus asserted by him was *bona fide*. That if the purchase, under which the son claimed title, was made by the father, and the title taken in the name of the son, to defeat the creditor of the father, it would not prevent C, or one clothed with the title of C, from suing for the recovery of the property.
2. A party has a right to insist, that a proper charge, shall be given in the terms in which it is asked, and the giving a charge subsequently, the same in substance, will not cure the error.

Error to the Circuit Court of Perry. Before the Hon. G. Goldthwaite.

DETINUE by defendant in error, who was the plaintiff below, against Hinton, to recover three negro slaves. A verdict and judgment was rendered for the slaves, or their alternate value, to reverse which Hinton brings the case to this

court. The facts appear from a bill of exceptions in the cause, taken upon the trial. The plaintiff below claimed title to the slaves in suit, under a bill of sale from one Caldwell, dated 17th October, 1845, which after reciting the receipt of \$300, in full payment for the slaves, states, "which said slaves have been removed, or stolen from this (Panola) county. I therefore convey the chance of said slaves only, and convey such title as is in me, or all the title I ever had at any time." Plaintiff further offered proof, to show that said Caldwell had purchased said slaves, at a sale made by the sheriff of Panola county, in the State of Mississippi, under an execution against one James Hinton, the father of the plaintiff in error, and that in a few days after such purchase, said slaves were secretly taken out of Caldwell's possession, by the defendant in error, who claimed said slaves under a bill of sale, made by one Jeffries to him in 1841, which bill of sale was read to the jury, Jeffries being at the time of the sale the owner. The slaves were delivered to said James B. Hinton, and were in his possession at the time of the execution of the bill of sale by Caldwell to plaintiff below. The slaves were purchased with the money of the father, James Hinton, and were placed in his possession, where they remained until they were levied on, and sold for his debts, existing prior to the purchase from Jeffries.

The circuit court was asked to charge, by the defendant below—1. That the bill of sale from Caldwell to plaintiff, as herein set forth, was not such an instrument as would authorize the plaintiff to maintain this action in his own name. 2. That if the claim of the defendant to the slaves sued for, was not subordinate, but adverse to the claim of the plaintiff below, he could not recover in his own name. These charges, as asked, the court refused to give, but charged the jury, that if the bill of sale from Jeffries to the defendant below, was fraudulent, and if said property was the property of the said James Hinton, and was sold under executions against him, and purchased by Caldwell, to whom possession was delivered, and that afterwards, Caldwell was deprived of the possession of said slaves, either by a trespass or a felo-

ny, that he could, under such a state of facts, transfer a title to said slaves to the plaintiff, although not in the actual possession of said slaves; and such a title as would authorize the purchaser to maintain an action in his own name against the person who came to the possession by a trespass, or felony. That if Hinton was in possession of said slaves, at the time of Caldwell's sale to plaintiff below, not as a trespasser, but by virtue of the bill of sale from Jeffries to him, which he believed to be *bona fide*, that then Nelms could not assert the title in his own name, so as to recover said slaves. That if James Hinton was indebted at the time he purchased said slaves from Jeffries, and if the purchase was made by him, (James Hinton,) and the bill of sale taken in the name of his son, (the defendant,) by way of gift to him, the slaves so given would be liable to the debts of said James, existing at the time of said gift, notwithstanding his property, at the time of the gift might considerably have exceeded the value of the slaves given. The refusal of the court to give the charge asked, and the charge given, the plaintiff assigns as error in this court.

GARROTT, for the plaintiff in error, made the following points:

The conclusion of the bill of sale to Nelms is, "which negroes have been removed or stolen from this county. I therefore convey the chance of said negroes only. I convey such title as is in me, or all the title I ever had at any time," &c. The first charge of the court asked for and refused was this naked question, "can the vendee, under such title, support an action in his own name," unconnected with any other fact? Plaintiff's bill of sale shows, that at the time of the sale, his vendor was not in possession—the *mere chance* of recovery was sold. The proof fully justifies the inference that the negroes were taken from the possession of Caldwell by the plaintiff in error, and as he took under a claim of title, he certainly was not guilty of a felony. The charge refused, therefore, was, in effect, to charge the jury, that if, in obtaining possession, the defendant below committed a trespass, that still the plaintiff below would be entitled to recover, in his own name. This position cannot be sustained.

The law will not allow such a sale of a right of action.—
Brown v. Lipscomb, 9 Porter, 472; Goodwin v. Loyd, 8 Ib.
237.

2. Refusal to charge is equally untenable. The court refused to charge, that if the title of defendant below was paramount and adverse to that of plaintiff's vendor, that still the plaintiff below would be authorized to sue and recover in his own name. This refusal is wholly unconnected with any other charge, and is clearly erroneous, as decided in Foster v. Goree, 5 Ala. R. 425.

3. The first charge is, that if Caldwell lose his possession, either by a trespass or a felony, he could transfer his right of action. If he lost possession by a trespass, he had a right to sue in his own name, but he could not transfer that right to another. See Brown v. Lipscomb, *supra*.

4. The ground upon which the court seems to have based the other charges is, that as James Hinton, the father, was indebted at the time of the gift to his son on the administration bond, that the gift was void, and therefore the son could not hold adversely.

Now what title did the defendant below get by his bill of sale from Jeffries? As between him and Jeffries it was good, as between him and his father it was good. It was good against the world, until avoided by the creditor. If this debt had been paid by the father, the title of the son would have been perfect, without any other act on the part of either. There was, therefore, only a lingering equity in favor of the creditor, to have his debt paid out of the property, consequently the title of the son was not void, except as to the creditor.

But if the title of the son was void, and was not obtained by force or fraud, as his was not, his possession would still be adverse. Wier v. Davies & Humphries, 4 Ala. R. 442; Horton v. Smith, 8 Ib. 74; La Frambois v. Jackson, 8 Cow. 589; Clapp v. Bromagham, 9 Ib. 530.

A. B. MOORE, contra.

1. The proof in this case shows, that the plaintiff in error is the voluntary donee of his father, James Hinton, and that

the donor was largely indebted at the time of making the gift. The gift is therefore within the statute of frauds, and void as to existing creditors. See Clay's Dig. 254, § 2.

2. A voluntary conveyance will never be upheld to defeat a prior creditor, whatever be the amount of his demand, although the donor reserve property sufficient to satisfy the debt. Nor is there any exception to this rule, in favor of advancements made to children by parents. See *O'Donnel v. Crawford*, 4 Dev. 197; *Read v. Livingston*, 3 Johns. Ch. R. 481.

3. In this case, the purchase being made by the father, in the name of the son, was fraudulent, as well as voluntary, and according to the well established current of decisions, would be void against existing creditors. See *Elliott v. Horn*, 10 Ala. Rep. 352.

4. If the owner of a personal chattel is not in the actual possession, but is withheld by another, and the owner is ignorant of the fact, and under such circumstances parts with the title, his purchaser would succeed to his rights, and be entitled to sue in his own name. See *Brown v. Lipscomb*, 9 Porter, 479.

5. The proof clearly shows, that Caldwell, the owner, did not know, at the time he sold the slaves in question to Nelms, the defendant in error, that they were withheld by any one, or if they were he did not know by whom, or under what pretence. The title, therefore, of Caldwell, was not converted into a *chose in action*. See cases last cited.

6. To make the possession of Hinton adverse, his claim must be *bona fide*, and Caldwell must have had knowledge of his claim, at the time he sold to Nelms. See cases last cited.

CHILTON, J.—The main question involved in this case is, whether the sale from Caldwell to the plaintiff below, can be sustained, or whether it amounts to a transfer of a *chose in action*, and is therefore void. The question is one of importance, as frequently connecting itself with the business transactions of the community, and has received a careful investigation. It appears, both from the bill of sale, and the proof, that at the time of the conveyance from Caldwell

to Nelms, (the plaintiff below,) the slaves conveyed were in the possession of the defendant, who claimed them as his own. The defendant held a bill of sale for them from Jeffries, but the money which he paid Jeffries, in consideration of the purchase, was advanced by his father, as whose property they were sold, for a demand existing at the time of the purchase, and purchased at sheriff's sale by Caldwell, the plaintiff's vendor. There can be no question, but that the property was liable to the debts of the father, existing at the time of the gift to the son; this is not gainsayed by the counsel for the plaintiff in error, but it is insisted, that as *no fraud in fact is shown*, and as the bill of sale to the son conveyed a good title, as against every one except the creditor of the father, it was sufficient to render his possession adverse, and thus to change the interest of Caldwell, into a *chose in action*, which could not be assigned. *Choses in action*, as contradistinguished from things in possession, may be defined to be, such things as the owner has not in possession, but merely a right of action to recover the possession. 2 Bl. Com. 389, 397; 1 Chit. Pr. 99; 1 Bouv. L. Dic. 260; 1 Sup. to Ves. jr., 26, 59. One of the qualities pertaining to such rights at common law, is, that they are not assignable. The reason of this rule was, to prevent maintenance, (Co. Lit. 214,) and to prevent the weak from being oppressed by a powerful antagonist, to whom his competitor might assign his title, and who, by his wealth, his influence, or his power, might prevent the ends of justice. Its policy also is found in the fact, that it discourages litigation, by preventing those who will not sue themselves, from transferring their interest to others of more litigious dispositions. 2 Woodeson's Lec. 387. Blackstone calls it "the strict rule of the ancient common law," and assigns as the reason for the rule, "because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law." 2 Com. 442. See also, Greenby & Kellogg v. Wilcocks, 2 Johns. Rep. 1; Coolidge v. Ruggles, 15 Mass. 387. Whatever may be said in regard to the rule having its origin in a state of society different from ours, it has been too long recognized by the judicial decisions of this State now to be

departed from. *Holloway v. Lowe*, 7 Porter's Rep. 488. But while the rule is adhered to, the difficulty consists as to its application—as to when the party who is out of possession, shall be said to have a mere right of action, which he may not assign. In other words, what shall be considered an adverse possession so as to change the title of the owner into a mere right to sue.

Several decisions of this court have been made upon this point. In *Goodwin v. Loyd*, 8 Porter, 237, the plaintiff purchased certain slaves from one who had title, but who, at the time of the sale, was out of possession. The party in possession, and from whom the plaintiff's vendor derived title, claimed that he had merely loaned them to the plaintiff's vendor, and the question was made, whether the plaintiff could, under such a state of facts recover. The circuit court held, if the plaintiff's purchase was absolute, and *bona fide*, he had a right to recover, notwithstanding the defendant may have had wrongful possession of the slaves at the time of the sale to the plaintiff.

This court, upon the authority of *Stedman v. Reddick*, 4 Hawkes's Rep. 29, and *Stogdale v. Fergate*, 2 Marshall's R. 136, reversed the decision of the circuit court, and, dissenting from the opinion of Judge Story in the case of the brig *Sarah Ann*, 2 Sumner's Rep. 206, determine, that the plaintiff had purchased a right of action, which by the common law was not assignable, and which he could not assert in his own name. The question, however, is left open, “as to whether cases may not exist, in which the act of a mere trespasser, or wrong-doer, would operate no change of possession.” The same point again came before this court in the subsequent case of *Brown v. Lipsecomb*, 9 Porter's Rep. 472, and the additional question was raised, whether a possession of defendant, acquired by the trespass, or fraudulently, operated to change the right of the owner, into a *chose in action*, so as to deprive him of the power to sell the slaves. The court say, “If an owner of a personal chattel, is not in the actual possession, but it is withheld by another, and he is ignorant of the fact, and under such circumstances, parts with the title, it is conceived that his purchaser would succeed to his rights; but if the owner is dispossessed by one, *bona fide*

claiming title, and the fact of the dispossession, and *bona fide* claim, is known to him, his title is changed into a *chose in action*, which cannot be conveyed or transferred to another." So that according to the principles settled in the case last cited, to avoid the sale of Caldwell to the plaintiff below, the defendant, at the time of the sale, must have had, *actual possession, a bona fide claim of title*, and Caldwell must have knowledge *at the time of his sale* to the plaintiff, of the assertion by defendant of his claim, all which, the case decides, should be left to the decision of the jury. In *Sims v. Canfield, Ex'r, &c.* 2 Ala. Rep. 555, it is held, that an adverse possession of six years, *under claim of title*, shall perfect the possessor's right to the property, so as to enable him to maintain an action against the original owner who may afterwards acquire the possession, and that the statute of limitations commenced running, from the time the defendant came to the possession of the property. Nothing is said in this case, as to the manner in which the defendant acquired the possession, or as to the *bona fides* of his claim. •

In *Weir v. Davis & Humphries*, 4 Ala. Rep. 442, the rule laid down in *Brown v. Lipscomb* is explained, and enforced, and it is held, that, although a purchaser of a slave from an administratrix at private sale, took no title, yet having *bona fide* purchased, and paid for the slave, it was not, while in his possession, subject to be levied on by execution against the estate, which the seller represented. "The sale," it is said, "is illegal, and passes no title, yet the purchase money was received, and appropriated by the administratrix, in due course of administration. In equity, the purchaser could charge the slave with the payment of the sum which he has paid into the estate, and which has been appropriated as above stated. In the case of *Dunklin v. Wilkins*, 5 Ala. Rep. 199, and *Foster v. Goree*, *Ib.* 424, this court re-affirm the decision of *Brown v. Lipscomb*, and in the first case, decide, that the conversion of a chattel must be known by the owner, to render a sale by him inoperative. See also *Strong v. Strong*. 6 Ala. Rep. 345; *Carlos, use, &c. v. Ansley*, 8 Ala. Rep. 902; *Horton v. Smith*, *Ib.* 73.

In *Ansley v. Carlos*, it is held, the mere fact that the defendant set up a hostile claim, was not sufficient, but that the

possession must have been acquired, and asserted in good faith, to change the title of the owner into a right of action. 8 Ala. R. 903. See also Doe ex dem. Farmer's Heirs v. Es-lava, 11 Ala. Rep. 1028, Ib. 1045, and Lamar v. Minter, at the present term. I have thus collated our own decisions, upon this subject, that I might deduce the principles decided, and if possible, by their application to this case, put this vexed question to rest. I think the rule as laid down in Brown v. Lipscomb, 9 Por. Rep. 432, is sustained both by reason and authority, and should be adhered to from considerations of sound policy. The defendant, in order to avoid the sale, made by Caldwell to the plaintiff below, must show—1. That *at the time* of the sale, he had the actual possession of the slaves sued for. 2. He must be able to connect his possession, with a *bona fide claim* of title. 3. And which claim of title he openly asserts, as hostile, or adverse to the title of Caldwell. If his claim be founded in fraud—if he is but the stakeholder, receiving the conveyance from Jeffries, to screen the property from his father's debts, when the father's money, which should have paid those debts, actually paid for the slaves, his fraud shall not avail him, so as to affect the rights of such creditors, or those who come in as purchasers, *bona fide*, and for valuable consideration, under their execution. The law sets the seal of its decided condemnation upon such title, holding it unavailing for any purpose, or at any time, as against those intended to be injuriously affected by it. In the language of Mr. Roberts, "all the partialities of the law, expire under its antipathy to fraud." Rob. on Fraud. Conv. 520; see Pickering v. Lord Stamford, 2 Ves. jr. 280; 4 Verm. R. 405; Smithwick v. Jordan, 15 Mass. R. 113; Gilbert v. Burgott, 10 Johns. Rep. 457; Brooks v. Marbury, 11 Wheat. 90; Gubbins v. Creed, 2 Sch. & Lefr. 223; Ib. 474; Jackson ex dem. Scofield v. Collins, 3 Cow. 89.

The claim of title aside, the defendant stands in the attitude of a bare trespasser. Can he be allowed to avail himself of force, any more than of fraud, to defeat the rights of the plaintiff, by depriving Caldwell, his vendor, of his free agency in disposing of the slaves? Is it true, that if one by brute force, or by felony, wrest from me my property, he thereby acquires a title paramount to my *bona fide* assignee?

It is clear to my mind, that the transfer of the title, does not in such case, come within the mischief intended to be remedied by the laws against champerty and maintenance. The reason, as we have seen, which lies at the foundation of these laws, is the prevention of litigation, and the protection of the weak and helpless against the power and influence of some assignee, who might prevent the ends of justice in their oppression. Certainly they were never designed to postpone the peaceful remedy which the law ordinarily affords in difference, to fraud, or lawless violence. I do not wish to be considered as trenching upon the decisions which authorize a party in possession, holding adverse to the rightful owner, from invoking the statute of limitations. It does not necessarily follow, that in every case where the owner by his *laches* would lose his estate, the possessor should have such interest as would avoid the deed of his adversary. 2 Russ. 156; 1 Leach, 522.

But without extending this opinion, it is clear from what has been said, the charge given by the court, was entirely correct, and conforms to the views here ascertained, and also that the court very properly refused to charge the jury, that the plaintiff could not maintain the action in his own name under the bill of sale, but as the adverse possession, and *bona fide* assertion of claim, was a matter for the jury, as was decided in *Brown v. Lipscomb*, *supra*, the court should have given, as asked for by the plaintiff in error, the second charge, which refers the adverse title to the jury. See also *Hall v. Dewey*, et al. 10 Verm. Rep. 593; *Stephens v. Dewing*, 2 Aik. R. 112. The court in substance gives the charge asked, in a manner calculated to enlighten the jury, but the rule is, that when a charge that is proper is prayed to be given, the party has a right to insist upon it as asked, and the subsequently giving a charge the same in substance, will not cure the erroneous refusal. *Clealand v. Walker*, 11 Ala. R. 1059.

Let the judgment be reversed, and the cause remanded.

BARRON, ADM'R, v. VANDVERT, ADM'R.

1. An administrator *de bonis non*, may sue in his own name, as such administrator, upon a note made payable to his predecessor in the administration.
2. It is the duty of the court to strike out a plea pleaded by its title, on the other party objecting to receive it, but if he demur to it, he does not thereby admit that the name of a plea is a defence regularly interposed.
3. When a party has the benefit of a defence, under the plea of *non assumpsit*, he cannot complain that a demurrer was improperly sustained to a special plea, setting up the same defence.
4. A payment of part of the sum due upon a note, is not a sufficient consideration for a promise to remit interest due upon the note, or to delay suit.
5. An administrator is not under a moral obligation to perfect the title to land, the consideration of a note held by him in his representative character.

Writ of Error to the Circuit Court of Perry. Before the Hon. J. D. Phelan.

THIS was an action of assumpsit, instituted by Samuel Burnett, who thus describes himself, and deduces his right to sue, viz: "Samuel Burnett, administrator of all and singular the goods and chattels, rights and credits of William J. Bettis, deceased, left unadministered by Francis Bettis and Gabriel J. Handley, who were formerly administrators of the goods and chattels, rights and credits of the said William J. Bettis, deceased, but who resigned their administration without fully administering said estate," complains of James B. Tutt, &c. The declaration then describes as a cause of action, a promissory note made by Tutt, on the 24th September, 1838, by which he promised to pay to Francis Bettis, administrator of William J. Bettis, on or before the 1st day of March, 1841, the sum of six thousand and five hundred dollars, for value received. It is then alledged that Francis Bettis, upon resigning his administration, delivered this note

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to Gabriel S. Handley, who was appointed administrator of the unadministered assets of William J. Bettis, deceased ; that afterwards Hanley resigned the administration and delivered the note to Burnett, who had been appointed administrator of the unadministered assets of William J. Bettis, deceased. By means whereof, &c.

Pending the suit in the circuit court, both the original parties died, and John Vandvert, administrator, &c. was made the plaintiff, and John Barron, administrator of Tutt, was made a defendant. The defendant demurred to his declaration, and his demurrer was overruled. Thereupon the defendant pleaded—1. Non assumpsit. 2. Payment and set off. 3. *Ne unques administrator*. 4. That Gabriel S. Handley was, on the 21st June, 1841, the administrator of Wm. J. Bettis, deceased, and in possession of the promissory note on which the action is founded, and then agreed with Tutt, the defendant's intestate, that he, Tutt, should not be required to pay any interest, or the balance of principal due thereon ; but he, Handley, as administrator, released and fully discharged the intestate from the payment of interest, &c. for a valuable consideration. 5. This plea varies from the preceding, by alledging that Handley agreed with the defendant's intestate, that if he would pay him \$1200 on the note declared on, which sum was then and there paid, then he, intestate, should not be required to pay the balance of principal on said note ; so that he, Handley, as administrator, realeased and fully discharged the intestate from any balance on the note : *Further*, that the balance remaining unpaid, should stand without interest, until the titles to certain lands were made clear to the defendant's intestate—meaning thereby the lands for which the promissory note was given. It is then alledged, that the titles to these lands have not been made clear or free from incumbrance, or tendered to the defendant, or the intestate in his lifetime. The plaintiff demurred to these pleas, and refused to receive the first three which were pleaded *in short*, as stated above, and his demurrer was sustained. Thereupon an issue was joined on the plea of non-assumpsit, which being submitted to a jury, a verdict was returned for plaintiff, and judgment rendered ac-

cordingly. A bill of exceptions, sealed at the instance of the defendant, presents the following points: 1. The plaintiff having produced the note declared on, and rested his case, the defendant then proved and read to the jury an agreement indorsed on the note as follows: "March 1, 1841, Received on the within note twelve hundred dollars; as to the balance of the within note, it is to stand without interest, until the titles of certain land is made clear to James B. Tutt, for which the within note was given as consideration. G. S. Handley, adm'r,"—and here rested his case. Plaintiff then read to the jury, the transcript of a record from the orphans' court of Wilcox county, which contained a petition filed by James B. Tutt against Francis Bettis, administrator of William J. Bettis, deceased, to compel the administrator to make titles to certain lands, which was sworn to and filed on the 19th August, 1839, at "a regular term of the orphans' court;" also, a decree rendered by that court, at the "November term," holden on the 18th day of that month, in 1839, requiring Francis Bettis, administrator as aforesaid, to execute to the petitioner a deed conveying in fee simple all the title, both legal and equitable, which was vested in his intestate, at the time of his death, or in his heirs since that time, to the lands described in the petition: *Further*, that Francis Bettis as such administrator, deliver to the petitioner all titles and evidences of title, both legal and equitable, which were in his possession. Plaintiff also read to the jury a deed purporting to be made by Francis Bettis, administrator, &c. in pursuance of the decree above recited, dated the 17th April, 1840. To the introduction of the transcript and deed the defendant objected, because the same was irrelevant evidence, and because the lands therein described were not shown to be the same as those referred to in the agreement indorsed on the note. Plaintiff then proved that Tutt admitted that the land conveyed by the deed, and of which he (Tutt,) "was in possession, was the land for which the note was given;" the court then overruled the objection and permitted the transcript and deed to be read to the jury.

2. Upon the foregoing testimony the plaintiff prayed the court to charge the jury, that the agreement, or stipulation, indorsed on the note, was without consideration, and void,

and not binding on the estate of Wm. J. Bettis, or the plaintiff; and that notwithstanding the same, the plaintiff was entitled to recover. Which charge was given accordingly.

3. The defendant prayed the court to charge the jury, that the agreement being executed by Handley while he held the note as administrator *de bonis non*, was not void for want of consideration, but was valid and binding on the estate, and that the plaintiff could not recover without showing a compliance on his part with the stipulation therein contained. Which charge the court refused to give.

4. The defendant further prayed the court to charge, that Gabriel S. Handley, as administrator, was authorized to make such an agreement, or stipulation, as that given in evidence, and that it was binding on the plaintiff: *Further*, if they should find for the plaintiff, they were not authorized to calculate interest on the note. This charge was also refused. To the several rulings of the circuit court, the defendant excepted, and here assigns the same as errors.

J. R. JOHN, for the plaintiff in error. Since the passage of the act of 1837, an administrator *de bonis non*, cannot, without an indorsement maintain an action in his own name on a note given to his predecessor; and if he can, it is necessary to alledge in the declaration, that the money when collected, will be assets of the estate. It is not enough that the payee is described in the note as administrator, and the plaintiff in the declaration as his successor. Clay's Dig. 326, § 76; Minor's Rep. 206; 2 Stewt. Rep. 133; 2 Stewt. & P. Rep. 45; 3 Ala. Rep. 150; 6 Ala. Rep. 387; 5 Port. R. 145.

A demurrer is not the proper mode of taking advantage of a plea, which is pleaded *in short*, as it is familiarly called. But if the law be otherwise, the fourth and fifth pleas are good within the act which abolishes special demurrers. 5 Ala. Rep. 451.

Handley, as administrator, was authorized to make the agreement indorsed on the note. Bac. Ab. *Release, E*; Toller's Ex'rs, 134; 2 G. & Johns. Rep. 86; 1 Wend. R. 583; 1 Atk. Rep. 462; 2 Ves. Jr. Rep. 265; 6 Ala. Rep. 387. It has been held, that either a moral or equitable obligation

is a sufficient consideration to support an express promise. 5 Taunt Rep. 35; 15 Verm. Rep. 716; 2 Caine's Rep. 150; 2 Dev. L. Rep. 517. In the present case there was not only a moral and equitable, but a legal obligation resting on the administrator to make clear titles to the lands for which Tutt had given the note. 8 Ala. Rep. 375.

If the agreement had been made simultaneously with the note, its validity would not be questioned, and as a subsequent defeasance, it may be pleaded in bar of the action unless the condition has been performed. 8 Ala. Rep. 375; Cro. Eliz. 623; 2 Saund. Rep. 144, note 2; 16 Mass. Rep. 24.

The parties to a contract may enlarge the time of performance, waive the conditions, alter them, or after a breach, release the damages. 1 Phil. Ev. 563, 564; 3 Id. C. & H's Notes, 1479 to 1481; 1 Johns. Cas. 22; 1 Cow. Rep. 249; 5 Id. 497; 7 Id. 48; 7 G. & Johns. Rep. 407, 417; 3 Johns. Rep. 520; 14 Ib. 330; 5 Stew. & P. 91; 9 Pick. R. 298; 1 Serg. & R. Rep. 312; 4 Id. 241; 2 Johns. Rep. 186; 7 Mass. 153; 16 Id. 24; 17 Id. 623. The agreement operates as a perpetual agreement not to sue, unless clear titles should be made to Tutt. This, according to the authorities cited, is in legal effect a release. And if the principal is recoverable, certainly the interest is not, until the condition contemplated by the agreement is performed.

Even if the agreement be voluntary and gratuitous, still it must be allowed to operate. 7 Mass. Rep. 265; 16 Id. 24. But it may be inferred that the original agreement was rescinded, and that indorsed on the note substituted as a new one. If so, the consideration is unquestionable. 9 Pick. R. 298.

The proceedings in the orphans' court of Wilcox, and deed consequent thereon, bear date previous to the agreement with Handley, and do not show a compliance with it; consequently they were irrelevant and calculated to mislead the jury. 7 Port. Rep. 437; 1 Ala. Rep. 540.

E. W. PECK, for the defendant in error, made the following points: 1. The action was well brought in the name of the defendant in error as administrator *de bonis non*. King

& Clark v. Griffin, 6 Ala. 387. 2. The declaration sufficiently shows that the recovery would be assets, &c.

3. The indorsement on the note made by the previous administrator, interposed no objection to a recovery. 1. There was no consideration. Doe ex dem. Leverich v. Watts, 6 Ala. 482. 2. If it imposed any objection, it was on the party that made it as an individual, and did not bind the subsequent administrator.

4. The pleas demurred to were clearly bad, and the demurrer was properly sustained. If the memorandum on the note did not of itself, without other proof, show a defence, then the subsequent proceedings, if erroneous, could work no injury to the plaintiff in error, and consequently would be no cause for reversal; but we insist that the evidence and the charges of the court are free from error.

COLLIER, C. J.—The act of 1837, which has been cited for the plaintiff in error, merely declares that notes, &c. payable to a person or bearer, shall be sued on in the name of the payee, his indorsee or personal representative. It is perfectly clear that it does not interfere with the right of an administrator *de bonis non* to take possession of the unadministered assets of the estate he represents; and to sue as such upon notes or other evidence of debt payable to his predecessor in the administration. The case of Spence v. Rutledge, 11 Ala. Rep. 490, and the citations there made, show the right of the administrator *de bonis non* to sue in such case, and that the declaration sufficiently alledges the money recoverable on the note, will be assets of the plaintiff's intestate.

It was clearly competent for the circuit court to have stricken out the pleas which were pleaded *by their title* upon the plaintiff's objection to receive them. The plaintiff might (as he did) indicate his objection by demurrer, accompanied by a refusal *ore tenus* to recognize the pleas. By demurring, he waived nothing—certainly did not admit that the name of a plea, is a defence regularly interposed. A demurrer only admits the truth of facts which are well pleaded; hence it is, that we have repeatedly held, a plea which should be verified by affidavit, is bad on demurrer, if not thus supported.

We need not consider whether the demurrer to the fourth

and fifth pleas were rightfully sustained; for however this may be, the defendant has had the benefit of the defence they set up, under the plea of *non assumpsit*, and this has prevented the judgment on demurrer from working an injury. 8 Ala. Rep. 942.

In Doe ex dem. Leverich & Co. v. Bates, 6 Ala. Rep. 480, we said, "it may be laid down generally, that a mere parol agreement, whether written or unwritten, requires a consideration to support it;" and although it may not be necessary, that the consideration should be expressed in the writing, yet if it is not there expressed, it must be proved by evidence *aliunde*. To sustain this conclusion, many cases are cited. The law may be otherwise, where a contract without a seal is made the foundation of an action. 9 Ala. Rep. 638. In the case first cited, it was decided that where the plaintiff in a judgment receives a partial payment thereon, and agrees to *stay the same for six months*, and no execution issues until the expiration of that period, the agreement will be considered voluntary, and the lien of the judgment override and defeat a conveyance made by the defendant during the time the indulgence was granted. It is said, "if the agreement was voluntary when made, the mere acquiescence of the plaintiffs cannot impart to it a different character in law."

A promise by the creditor to accept of his debtor a less amount than is due, or an agreement upon the payment of a part to forbear a suit for the residue, will not be recognized as binding in law. 2 Bibb's Rep. 27; 12 Johns. Rep. 426; 2 Hall's Rep. 185; 2 Verm. Rep. 536. See also 2 Johns. Cases, 92; 11 Pick. Rep. 150; Wright's Rep. 367. The payment of \$1,200 by the defendant's intestate in extinguishment of the note *pro tanto*, furnished no consideration for the stipulation to remit interest, or to delay suit thereon. This is well established by the decision of this court, which we have seen rests upon ample authority.

It has been argued that as the land referred to in the agreement was the consideration of the note, the administrator was under a *moral obligation* to cause the titles to be perfected; he therefore agreed to perform a moral duty, and the law will enforce his undertaking. This argument assumes more than is proved by the writing, even assisted by

all the proof which was made at the trial. If there was no obligation upon the administrator, which the law would enforce, to clear the defendant's title from incumbrance or embarrassment, it is difficult to perceive how moral duty could require him gratuitously to enter into an engagement for that purpose. But be this as it may, the agreement does not disclose a consideration deducible either from legal or moral duty, and we have said that such a writing, unaided by extrinsic proof, cannot be operative. The law has often upheld *express promises* founded on a moral obligation; but to make one liable in such case, it should appear that the obligation is strictly and undoubtedly of such a character. 2 Bing. Rep. 437; 2 B. & Adol. Rep. 811; 13 Johns. Rep. 259. 289; 16 Id. 281, 283, n.; 3 Conn. Rep. 368; 7 Id. 57; 2 Pennsylv. Rep. 521; 1 Verm. Rep. 247; 2 Taunt. Rep. 184. This view relieves us from the necessity of giving to the ruling of the circuit judge a more particular examination. Our conclusion is, that the judgment must be affirmed.

LONG v. EASILY.

1. When the creditors of an insolvent estate, fail to nominate to the court an individual as a fit person to be appointed administrator, the court may appoint one.
2. An administrator of an insolvent estate, appointed since the passage of the act of 1843, may call on the administrator in chief, in the orphans' court, to account for the assets in his hands, and if he obtains a decree, may sue out execution upon it, notwithstanding the administrator in chief was appointed, previous to the passage of the act of 1843.
3. In a proceeding by the administrator *de bonis non* of an insolvent estate, against the administrator in chief, who had been removed, to obtain the assets in his hands, it is not necessary to make the heirs, or distributees parties.
4. No objection can be taken in the appellate court, for the allowance, or re-

jection of any item of the account, or for the failure to allow commissions, unless an exceptive allegation be filed in the orphans' court, showing the ground of the admission, or rejection.

Error to the Orphans' Court of Talladega.

THE plaintiff in error, was appointed administrator of the estate of William Long, by the orphans' court of Talladega, in November, 1841, and entered upon the execution of the trust. In September, 1842, upon his report, the court declared the estate insolvent. In February, 1844, in obedience to a citation, he filed his accounts, and vouchers, for a final settlement, and in April succeeding, on motion of his securities, was removed from office, and Solomon Spence, sheriff of the county, was *ex officio*, appointed administrator *de bonis non* of the estate. Nothing further appears to have been done, until the 7th December, 1846, when the defendant in error, sheriff of the county, and successor of Spence, was appointed administrator *de bonis non*.

On motion of the defendant in error, made in April, 1847, an order was made, that the account, as stated by Long, and filed in the court, be reported for allowance, at a time designated—that three weeks notice thereof be given in a newspaper published in Talladega, that the account would be allowed on that day, unless cause was shown to the contrary. The record states, that the deceased left a widow, and children, who are all minors, and some of whom, with their mother, reside in the State of Tennessee.

At an adjourned term of the court, the plaintiff, and defendant in error, appeared by attorney, and the court rendered a decree for the amount of the sales, as shown by the account, and interest, in favor of the administrator *de bonis non*, against the plaintiff in error; and directed execution to issue. To reverse this decree, this writ is sued out.

The errors assigned are—

1. The court erred in requiring the plaintiff in error to come to a final settlement with the defendant in error, as administrator *de bonis non*, as it appears that Solomon Spence was appointed administrator, and it does not appear that he was removed, or that he has in any way settled his account.

2. The court erred in rendering the final decree, which appears of record.

3. The court erred in not allowing the account current as filed, and shown in the record.

L. E. PARSONS, for the plaintiff in error.

The decree is erroneous, because execution is ordered to issue. Previous to the act of 1830, final decrees could be rendered in favor of distributees, but no execution could issue thereon. By the act of 1830, execution may be awarded on final decrees, in favor of heirs, distributees and legatees. Clay's Dig. 304; Willis v. Willis, 9 Ala. Rep. 721.

Prior to the act referred to, obedience to decrees was enforced by attachment, as were decrees in chancery, until executions were authorized to be issued thereon by statute.

The act of 1843, Clay's Dig. 144, § 9, only authorizes an administrator *de bonis non*, when appointed administrator according to the provisions of that act, to recover of the administrator in chief by any proper action. But that statute does not authorize an execution, if the proceedings be in the orphans' court. But it is contended, that this estate is not in a course of settlement under that act as an insolvent estate. The decree of insolvency was rendered in September, 1842, before the passage of that act, and the act of 1843 intended to introduce a system of rules entirely new. 8 Ala. 457.

The act of February, 1846, authorizes a decree in favor of an administrator *de bonis non*, but does not authorize an execution thereon.

The provisions of the act of 1843, in regard to insolvent estates, do not apply to this case. See 5 Ala. Rep. 125; 7 Ala. Rep. 924.

The parties entitled to distribution, are minors, and the statute requires they shall be notified as in cases of non-residents, in chancery causes. The order of publication is for three weeks, and the rule in chancery is, that publication be made for not less than four consecutive weeks, and also posted at the court house door, &c. Every party entitled to a distributive share, must be brought before the court in some mode, before a valid final settlement can be made. See 7 Ala. Rep. 15.

It was the duty of the judge, to allow the account as stated, unless objected to. Clay's Dig. 226. The reason of charging the administrator Long with Flack's note was, that Flack's note, and security, were not in accordance with law. The administrator is the judge of the security, and if he errs in this, he is liable on his bond, but cannot be proceeded against in this summary way. Commissions should have been allowed to Long, and Flack's note should not have been charged to him. See 1 Ala. 594; 5 Ala. 128.

S. F. RICE, contra.

Although the estate was declared insolvent, in September, 1842, yet after the passage of the act of 1843, the estate being insolvent, had to be conducted by the rules and provisions of that act. See 7 Ala. 923.

But whether this estate be conducted by the rules of the act of 1843, or not, by the act of 1846, the final decree rendered in this case, in favor of the administrator *de bonis non*, is authorized, and execution may issue thereon.

The plaintiff in error was properly chargeable with Flack's note, for if not collected, it is owing to the plaintiff's gross negligence, and he is chargeable with it. 9 Ala. Rep. 434; 8 Ala. Rep. 27. His conduct deprives him of all claim to commissions, but he cannot review the items of which the decree is composed, or the refusal of the orphans' court to allow him commissions, or particular credits, without showing he objected to the action of the court in reference to them, and spread his objections on record, in the nature of a bill of exceptions. See 5 Ala. 117; Powell v. Powell, 10 Ala. 900, 914.

DARGAN, J.—The first assignment of error is, that the court erred in refusing the plaintiff in error to come to a final settlement of his administration, with the defendant. The plaintiff in error was the administrator in chief of William Long, deceased, and in September, 1842, declared the estate insolvent. In March, 1844, he was removed from office for failing to give new securities, his securities having surrendered him, and Solomon Spence, sheriff of Talladega county, was appointed administrator *de bonis non*, by virtue of his of-

fice. Nothing appears to have been done by him in reference to the estate, and his term of office as sheriff having expired, the defendant in error, by virtue of his office as sheriff, was appointed administrator *de bonis non*, in the stead of Spence.

The grant of letters of administration to Spence was ordered to attach to his office, and not to his person. When his office as sheriff expired, his authority, and office as administrator ceased, and there was then no administrator of said estate, and the duty again devolved on the court to appoint another. But it is said, that by the act of February, 1843, (Clay's Dig. 193,) the creditors had the right to nominate the individual, whom the court should appoint administrator *de bonis non*, and they not having done this, the appointment of the defendant, must be considered as made under the laws existing previous to the act of 1843, and if so, no decree against the plaintiff in error could be rendered in favor of the defendant, on which execution could issue. I do not think it material to inquire, whether the creditors of an estate declared insolvent, previous to the passage of the act of 1843, have the right to nominate to the court the person to be appointed administrator *de bonis non*, on the removal, or resignation of the administrator in chief. Whether they have that right or not, the jurisdiction of the orphans' court, to appoint an administrator *de bonis non*, is not affected by the existence, or non-existence, of that right in the creditors: and indeed, by the act of 1843, in those cases, where the rights of the creditors to elect, or nominate the individual whom the court shall appoint is indisputable, if they fail to make the selection, or if for any cause whatever, there is no one nominated by the creditors, the court may continue the administrator in chief, or may appoint the general administrator of the county, if there be one; or the sheriff of the county, if there be no such general administrator. When therefore, the administrator in chief is removed, or resigns, and an administrator *de bonis non* is appointed, the appointment confers upon him the same authority over the estate, that the law gives to any administrator *de bonis non* of an insolvent estate; and he is entitled to all the remedies to reduce the estate to possession, that are given to any adminis-

trator *de bonis non*. Hence it is only necessary to inquire, whether an administrator *de bonis non*, of an insolvent estate, appointed since the act of 1843, can call on the administrator in chief to account to him for all the assets in his hands, or that have come to his hands, and in the orphans' court obtain a decree against him, on which execution can issue.

By the act of February, 1843, (Clay's Dig. 194, § 9,) it is enacted, that whenever an administrator *de bonis non* shall be appointed according to the provisions of this act, any former grant of letters of administration, shall be thereby revoked, and all the goods, chattels, and *choses in action*, money, and other personal effects, shall be vested in such administrator; and he shall be entitled to demand and receive, from the former administrator, or executor, all moneys, found due and owing from him to said estate, and all such goods, chattels, *choses in action*, and other personal estate, and deeds, and other evidences of title to real estate; and he may recover the same, by any proper proceeding, or action, either in the orphans' court, or in any court of common law, or equity, against such former administrator, or executor and his securities. This act gives the administrator *de bonis non* the right to recover of the administrator in chief, any moneys in his hands belonging to the estate. If it gives the right to recover, could we stop at obtaining a decree, and say, that no execution can issue? To recover, means to reduce to possession, or the statute would be nugatory so far as it gives the right to recover, in the orphans' court. But in our opinion, this act authorizes the issuance of any process suited to the nature of the decree that may be rendered; and if a decree be for a sum of money merely, then an execution may issue thereon.

We come therefore to the conclusion, that the appointment of the defeudant in error, is valid; that the grant of letters of administration to him, gives the right to administer the estate, as an insolvent estate, and that the orphans' court had jurisdiction to render a final decree against the plaintiff in error, in favor of the defendant, on which an execution could issue.

It is also contended, that the heirs and distributees of William Long, should have been notified of the final settle-

ment, in the same manner that absent defendants in chancery are made parties. This is not necessary. We have seen that the defendant in error, by virtue of the act of 1843, may proceed to collect from the administrator in chief, all moneys by him received that were of the estate, and that he might proceed, either in the orphans' court, or in any court, of law or equity. This, therefore, is a controversy directly between the administrator *de bonis non*, and the administrator in chief, in which the heirs and distributees have no interest. The estate being declared insolvent, all the effects are vested in the administrator *de bonis non*, for the purpose of paying the creditors in the manner prescribed by the statute. Their rights are represented by the administrator *de bonis non*, and if he, and the administrator in chief, are before the court, either at law or in equity, no other party is necessary, if the object of the suit be merely for the purpose of recovering the assets in the hands of the administrator in chief. But even on the supposition that there may be a contingent interest in the heirs and distributees, if the estate should be more than sufficient to pay the debts, yet as the act of 1843 gives to the administrator *de bonis non* the right to sue and recover of him, all assets in his hands, it follows, that no other person is a necessary party to the suit between the administrator in chief, who is removed, and the administrator *de bonis non*; and as both these were before the court and appeared by attorney, there is no error for want of parties.

The third and last question we shall notice is, that the court should have allowed the plaintiff in error commissions, and other items of credits, and should have adopted his account as returned by him, as there were no objections to it. We cannot *re-audit* the accounts in this court; if the court below did not allow commissions to the plaintiff in error, or if any item of credit was rejected, that should have been allowed, or if the plaintiff was charged with any amount which he ought not to have been charged with, it was his duty to have made his objections in the court below; to have shown the grounds, or the evidence on which the objection was founded, and to have spread those objections on the record, which might be done by way of a bill of exceptions. But in the absence of all proof, of the reasons why particular

items were allowed, or disallowed, and of all objections in the court below, there is nothing for this court to review. In the case of *Clark v. West*, 5 Ala. Rep. 117, this question was settled. It was determined in that case, that on the final settlement of an insolvent estate, if an improper charge is made against the administrator, or if he is held to account for assets not connected with the administration, that the only mode by which he could revise the action of the court, was to raise the question by exceptions, taken to the judgment of the court; and if no exceptions were taken in the court below, this court could not examine the question raised here for the first time. This decision seems to settle the practice, and indeed, there could not be any other rule of practice, as we should not be able here, to see the evidence on which the court below acted. After the best examination we have been able to give this case, it seems to us, there is no error, and the decree of the orphans' court is affirmed.

FREEMAN, ADM'R, v. BALDWIN.

1. A deed by which F acknowledges himself indebted to B in the sum of \$1,600 with condition, "that if the above bound H F, does convey, and deliver, to said D B, his heirs, &c., a certain negro woman, Rachel, and her child, named Reuben, conveyed and sold to the said H F, by the said D B, when the said D B pays the said H F, five hundred and sixty-two dollars, then this bond to be void," &c., whether regarded as a mortgage, or conditional sale, in the absence of proof of fraud, mistake, or surprise, cannot be explained by parol proof.
2. When the answer denies the execution of such an instrument, or alledges that it has been altered since its execution, by adding the condition, the execution must be proved.
3. If the instrument was valid, a bill could not be entertained to redeem the slaves, fifteen years after the execution of the instrument. The parties having lived together in the State of Georgia, after the execution of the bond for the period of time prescribed by the statute of limitations of that State,

to create a bar to a recovery at law, the title became perfect, and will protect the possession against a suit in this State, his possession having been adverse to that of complainant.

4. To enable the court to declare an absolute bill of sale to be but a security in the nature of a mortgage, the proof must be clear and convincing. Loose declarations of a trust, especially after great lapse of time, will not be allowed to overturn the written contract of the parties.
5. To make an absolute bill of sale, with a defeasance, operate as a mortgage, they must be executed at the same time. If the defeasance be executed afterwards, without consideration, it is a *nude pact*.

Error to the 16th Chancery Division. Before the Hon. W. W. Mason.

THE bill was filed by the defendant in error, to redeem certain slaves, under an instrument under seal, executed in the State of Georgia, on the 22d February, 1825. The facts, and the testimony, so far as they are necessary to illustrate the opinion of the court, are sufficiently detailed in the opinion of the court. The chancellor, upon the final hearing, decreed that the complainant had the right to redeem the slaves, directed an account to be taken, &c. This is now assigned as error.

E. W. PECK and G. W. GUNN, for plaintiff in error.

I. Conceding for the present, that the bond set out in the bill to have been made by the plaintiff in error, and that it is not void by reason of any alteration since its execution, then we insist—

1. That it shows the true character of the transaction between the parties was, an absolute sale of the slaves, Rachel and Reuben, with the right to re-purchase within a reasonable time, and not a mortgage. *Eiland, adm'r, v. Radford*, 7 Ala. R. 724; 4 Kent's Com. 144, and note c.

2. This being the character of the transaction, the bill should have been dismissed, because it does not state an offer to re-purchase at any time, much less within a reasonable time.

3. That the right to re-purchase, if it exists at all, is con-

fin'd to the slaves named in the condition of the bond, and does not extend to the other slaves mentioned in the bill.

4. The bill cannot be sustained upon the idea that there was a parol understanding, or agreement, between the parties, inconsistent with the legal effect of the transaction, as disclosed by the bond and condition.

II. The answer puts the factum of the bond in issue, and consequently cast upon the complainant the onus of proving its existence.

The only evidence offered by the complainant for this purpose, is that of the subscribing witness, Jesse C. Ousley. This witness, if it be insisted that he proves the fact of execution, proves also, at the same time, that which wholly destroys it as a valid instrument, and proves it to be utterly void; that is, he proves that there has been an erasure of a material part of the condition, since its execution.

The complainant cannot be permitted to impeach the credibility of this witness, because he is the complainant's own witness; or if he be permitted to do it, and does it successfully, then he destroys the testimony of the only witness who proves the execution of the bond, and thereby destroys the very foundation on which his right to relief depends.

BELSER, for the defendant in error.

1. The remedy in equity is clear, and the demand is not stale. *Sims v. Canfield*, Ex'r, 2 Ala. 560; *Kennedy's Heirs v. Kennedy's Heirs*, Ib. 572; *Sledge's Adm'r v. Clopton*, 6 Ib. 589.

2. The mortgage is proved to exist, and also the right to redeem. The agreement is under seal, and the statute of limitations of four and six years, does not reach the case—twenty and sixteen years are the statutes. *Brown v. Brown*, 5 Ala. 508; *Goodman v. Minter*, 8 Porter, 84; *Dexter, et al. v. Arnold, et al.* 1 Sumner, 109. Again, from what appears on the face of the bill, connected with the proof, a motion to amend the bill, or a special replication was not necessary. *St. John v. Garrow*, 4 Por. 223; *Humphries v. Terrel*, 1 Ala. 650; *Dexter, et al. v. Arnold, et al. supra*; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Jones v. Henry*, 3 Litt. 50; 2 *Pirtle's Dig.* 92, § 42.

3. The two last examinations of witness, Jesse C. Ousley, are irregular. Again, he is not our witness, but the witness of complainant, so far as these particular examinations are concerned. But even were he *our* witness, we could prove by other testimony, going to show that he erred in a portion of his testimony. Clay's Dig. 614; Bradford v. Bush, 10 Ala. 389. And so is the two last examinations of John Ousley.

4. But independent of the instrument set up by the bill, the parol evidence is sufficient to establish the right to redeem. Heard, Terrell, P. Ousley, and Wm. B. Ousley made it out by their testimony.

5. The children of a female slave, born after the execution of a mortgage, are liable to the demand of the mortgagee. Hughes v. Graves, 1 Litt. 319.

6. The decree is more favorable to the complainant than it should have been, therefore he cannot object.

7. The first bill of sale, exhibited by defendant's answer, is proved by both of the subscribing witnesses thereto, to have been intended as a mortgage, and by other proof. The second bill of sale appended to the said answer, has not been proved by the subscribing witness thereto, or in any other legal way. The mortgage of complainant has been proved by Jesse C. Ousley, and the death of the other subscribing witness, Nancy Ousley, is likewise proved, and it is also proved, that she witnessed it, with J. C. Ousley.

8. The complainant, under any circumstances of the case, has the right to redeem. Anon. 2 Hay. 26; Kim v. Smith, 2 Dev. Eq. 558; May v. Easton, 2 Port. 414; Crane v. Boswell, 1 Green. Ch. 264; Bastrop v. Rutledge; 7 J. J. Marsh. 218; Edgerton v. McRae, 5 How. 183. In Sewall v. Henry, 9 Ala. 33, the whole doctrine is reviewed—the case is different from this.

CHILTON, J.—The decree of the chancellor rendered in this cause is erroneous, and without entering upon an examination of all the points raised in the argument, I will notice such prominent objections to it as will show it cannot be sustained.

1. The complainant below founds his right to redeem the slaves in controversy, upon an instrument in writing, made an exhibit to the bill, the execution of which by the defendant is averred, and which is in these words: "The State of Georgia, Putnam county. Know all men by these presents, that I, Hugh Freeman, am held and firmly bound unto David Baldwin, his heirs and assigns, in the just and full sum of sixteen hundred dollars, for the true payment of which I bind myself, my heirs and assigns, firmly by these presents, witness my hand and seal, this 22d day of February, 1825. The condition of the above obligation is such, that if the above bound Hugh Freeman does convey and deliver unto the said David Baldwin, his heirs and assigns, a certain negro woman, Rachel, and her child, named Reuben, conveyed and sold to the said Hugh Freeman, by the said David Baldwin, when the said David pays the said Freeman five hundred and sixty-two dollars, then this bond to be void, otherwise to remain in full force and virtue. This 22d February, 1825. Signed, HUGH FREEMAN.

Test, Jesse C. Ousley, Nancy Ousley."

The defendant, in his answer to the allegation of the bill, charging the execution of the said instrument above copied, "denies that he ever executed and delivered to complainant the instrument in writing above set forth, and further answers, that he never signed any agreement which gave to complainant the power of redeeming the said slaves as charged." Thus it appears the *factum* of the instrument being denied by the answer, it was necessary to prove its execution. In order to do this, the complainant examined as a witness, Jesse C. Ousley, one of the subscribing witnesses, (the other witness, Nancy Ousley, having departed this life,) who testifies that the said bond from Hugh Freeman to David Baldwin was not in the same condition when he last saw it, that it was in when it was executed. That he was the draftsman of the instrument, and that since it was executed and delivered, that portion of said instrument which prescribed the time when the complainant was to pay Freeman the \$562, was erased. That the same bond was shown him by the attorney of complainant some years previous, when a suit

was pending in that state upon it. Now this being all the proof in regard to the execution of the instrument, we think it too clear to admit of argument, that it does not sustain the allegation of the bill, which is denied by the answer. The time when the money was to be paid by Baldwin to Freeman was a material part of the contract, and if this witness is to be believed, this has been erased. In *Brown v. Jones*, 3 Porter's Rep. 420, it was held to be a good plea to an action upon a promissory note, that the words, "with interest from date," have been added after its execution, without the maker's knowledge or consent. The same doctrine was re-affirmed in the case of *Harris v. Bradford*, 4 Ala. Rep. 214. The alteration having been made while the bond was in possession of Baldwin, and remaining wholly unexplained by any proof, we must necessarily infer it was so altered by his consent, and in this event, he can claim nothing by it.

But it is insisted, that this witness having been examined several times, contradicts himself; and further, that it is shown by the deposition of George W. Towns, that he has made contradictory statements, and that he is therefore not to be credited. If this be granted, the effect would be to destroy his whole proof, which would leave the instrument, which is the foundation of the complainant's right to redeem, unsupported by any proof, and the answer, which is directly responsive, and which puts its execution in issue, must, in such case prevail.

2. But there is another, and still more potent objection to granting the relief prayed by the bill. Whether we regard the instrument relied on as a mortgage, or as a conditional sale, the complainant should have sought his remedy within the time prescribed by the statute of limitations in analagous cases at law. The instrument bears date the 22d February, 1825; this bill was filed on the 21st November, 1839; a period of nearly fifteen years elapsed, after the cause of action accrued, before the complainant resorted to his supposed remedy by suit. The complainant and [defendant both resided near each other in the State of Georgia up to the year 1836, at which time the defendant removed and settled in the county of Macon, in this State. The defendant below relied upon the bar of the statute of limitations of Georgia, of

four years, and the statute of this State, which by analogy to the action of detinue, is six years. The statute of Georgia relied upon by the answer was, in our opinion, a complete bar to the relief. The cause of action having been extinguished by the law of Georgia, the right to redeem the slaves, if such right ever existed, as founded on the instrument above referred to, cannot be enforced here. The effect of the statutory bar, where the party has possession adverse to the complainant, as in this case, is not only to extinguish the remedy, but invests the possessor with the absolute right to the property. To apply our own statute to this case, dating its commencement from the removal of Freeman to this State, would be the creation of new rights, and the divestiture of a title which had become absolute and perfect under the laws of a sister State—such would be contrary to the uniform current of the decisions upon this subject. Story's Confl. Laws, § 582; *Bulgee v. Roche*, 11 Pick. Rep. 36; *Sims v. Canfield's Ex'r*, 2 Ala. Rep. 564, *Towns v. Bardwell*, 1 Stew. & P. Rep. 36; *Doyle v. Bouler*, 7 Ala. Rep. 246; *Goodman v. Monks*, 8 Porter's Rep. 95, and cases there cited. The proof made by the complainant in this case, of admissions on the part of Freeman, do not establish a continuing trust, which would avoid the statute. The witness, *Head*, speaks of declarations made at the time of the execution of the first bill of sale in 1824. *Terrel* speaks of admissions of Freeman as late as 1826, in which he is represented as saying, that he wished Baldwin would pay him the money he had loaned him, and take the negroes, as he did not wish to raise a family of negroes for him. *P. Ousley* proves similar admissions as far down as 1838, and *William Ousley*, says, that in 1825, Freeman expressed a willingness to receive the money he had paid Baldwin, and let him have the slaves, but acknowledged no right in him to redeem. I need not comment upon the inconclusive character of such proof, so easily fabricated and so difficult to refute. From the very nature of things, it must lose much of its force as testimony, when the finger of time for twenty years has been at work to efface it from the memory. This proof, op-

posed as it is, by the testimony of several witnesses, who prove an adverse holding, and by the writing which shows an absolute sale, is not sufficient to countervail the positive denial in the answer. It is a well established principle in the law of evidence, that to enable the court to declare an absolute bill of sale to be but a security in the nature of a mortgage, the proof must be clear and convincing.

3. But it is insisted by the counsel for the defendant in error, that the agreement relied upon is in the nature of a mortgage, and that Freeman set up no adverse title until 1833, when it was shown the money was tendered him, and that the right to redeem still exists; that neither the statute of Georgia nor of this State, under such a state of facts, had perfected a bar when the bill was filed. Let us test this proposition. Granting that the mortgagor may make an absolute conveyance, and take a defeasance from the mortgagee by a separate deed, yet these deeds must, I apprehend, be contemporaneous, and form but one transaction—one agreement. 2 Johns. C. Rep. 189; 2 Greenl. Rep. 152; 12 Mass. Rep. 456. If there was, as in this case, an absolute conveyance, and a year or more after that time, the vendee should execute his bond to permit the vendor to repay the purchase money and take the property so conveyed, without some additional consideration, the last agreement would be a *nude pact*, and under our law, where the consideration of sealed instruments may be inquired into, would be inoperative. But allowing it to operate, what would be its effect? Freeman had no demand upon which he could have sued Baldwin. Suppose the slaves had died after Freeman had held them under his absolute purchase for nine years, could it be successfully maintained that he could have recovered the \$562 out of the vendor, by reason of any thing contained in this alledged defeasance? I think not. Fully recognizing the principle that in all cases of doubt courts of equity lean in favor of a mortgage, the terms of this instrument, with the circumstances attendant upon its execution, clearly satisfy my mind it was intended as a conditional sale. The relation of debtor and creditor did not subsist at the time of its execution. The proof shows a mortgage had previously been

given, but which had been cancelled by the execution of an absolute bill of sale. There was no disparity at the time of the sale between the value of the slaves and the amount paid. There are *indicia* which carry conviction to my mind that the parties intended what the instrument itself, in no equivocal terms expresses, that Freeman having purchased the slaves near a year previously, agrees to re-convey them to Baldwin upon his paying \$562, the amount paid out by him for them, in a reasonable time, or, as we are advised from the proof, in a year from the date of said agreement. Regarding it as a conditional sale, the instrument was incapable of explanation by parol proof in the absence of fraud, mistake or surprise. *McKinstry v. Conly*, 12 Ala. Rep. 678. And the bill, being but an application for a specific performance, and Baldwin having delayed the tender of payment for an unreasonable length of time—having waited some nine years before he asserted his claim to enforce the contract, he has violated his contract, and should not be allowed to hold the opposite party to a performance of it.

There are several other views which we might take of the case, made by the proof, showing that the decree should not be sustained, but the above may suffice. The court is unanimous in the opinion that the decree of the chancellor is erroneous. It is therefore reversed, and this court, proceeding to render such decree as the chancery court should have rendered, orders and decrees that the complainant's bill be dismissed, and that the plaintiff in error recover of the defendant in error the cost of this court, and of the said chancery court. See *Eiland, adm'r, v. Radford*, 7 Ala. Rep. 724, and cases there cited, as to the distinction between a mortgage and conditional sale; also *Sewall v. Henry*, 9 Ala. Rep. 24.

PHILLIPS v. MCGREW.

1. A charge to the jury, that the plaintiff could maintain his action, "upon his possession, derived as heir of his deceased brother, and as his bailee," is erroneous, as it is an invasion of the province of the jury, whose right it was, to determine the character of the possession.
2. Possession is sufficient evidence of title, in trover, or detinue, against a wrong doer.
3. Delivery of possession, or something equivalent to it, is an essential ingredient of a gift.

Writ of Error to the County Court of Sumter. Before his honor G. B. Frierson.

THIS was an action of detinue at the suit of the defendant in error for the recovery of two female slaves, named Melissa and Eliza. The cause being submitted to a jury, a verdict was returned for the plaintiff, assessing the value of the slaves and damages for their detention severally, and judgment was thereon rendered. From a bill of exceptions sealed at the defendant's instance, it appears that the slaves in controversy were at one time the property of William McGrew, deceased, and were distributed to his son, W. P. McGrew, as a part of his father's estate. The defendant, Mrs. Phillips, was formerly the wife of Wm. McGrew, and the mother of W. P. McGrew and the plaintiff, as well as the mother of her co-defendant, Levin Phillips, by a second husband. W. P. McGrew, in the year 1833, and for several years previously, was in possession of these slaves, and continued the proprietor of them up to the 4th February, 1838, when he died. On the day last mentioned, the plaintiff was in possession of Eliza, and shortly afterwards Melissa came into his possession—both of which he retained until the 20th April, 1845, when they left his possession against his consent, and were on the next day found in the defendant's possession, who refused to deliver them up. W. P. McGrew was involved in difficulties for two years preceding his death—dur-

ing which time the plaintiff, as his agent, hired out the slaves for his use and benefit.

The plaintiff, to make out his title, offered the transcript of a report of commissioners appointed by the probate court of Washington county, in the Mississippi territory, to divide the personal estate of Wm. McGrew, duly certified by the clerk of that court; by which it appeared that the slaves in controversy had been allotted to the plaintiff and his brother W. P. McGrew. To the admission of this transcript, the defendants objected, on the ground that it was a mere detached part of the record, and there was no evidence that it had ever been acted on and approved. But the objection was overruled, the transcript read, and the defendants excepted.

Plaintiff proved that the slaves were once the property of of W. P. McGrew, and this was not denied by the defendant, or disproved by the testimony adduced by them. There was also evidence that Mrs. McGrew was in possession of Melissa in the lifetime of her son W. P.—that the latter then told her to keep the slave until he got out of his difficulties, and if he was never relieved, then she was to be the property of his half brother Levin. W. P. McGrew died intestate, and his estate was never administered on. Mrs. Phillips disclaimed in open court any interest in the slaves; and her son Levin, at the time of the trial, was only twenty-three or four years old.

The evidence having closed, the defendants, by their counsel, prayed the court to charge the jury, that the plaintiff could not maintain this action without first obtaining letters of administration upon the estate of W. P. McGrew, which was denied; and the jury charged that the plaintiff could maintain it upon his possession as heir of his deceased brother and as his bailee, against the defendants, although the case would be different in a controversy between the administrator of W. P. McGrew and the defendants. *Further*, if they believed that W. P. McGrew had made the conditional gift to Levin Phillips while his mother was in possession of Melissa, and that he never afterwards was relieved from his difficulties, or made claim to her, then the gift was valid.

Id. 310; 7 Id. 623; 10 Id. 600; 11 Id. 609; 3 Har. & J. Rep. 493; 4 Id. 310.

R. H. SMITH, for the defendant in error.

COLLIER, C. J.—No question has been made at the bar as to the admissibility of the transcript from the records of the orphans' court of Washington. It appears that after it was admitted as evidence, the plaintiff proved that the slaves in question were once the property of W. P. McGrew; and this was not denied by the defendants, or any testimony adduced by them to disprove it. If therefore the transcript should have been excluded, a question which need not be considered, its admission was rendered perfectly harmless, by evidence subsequently adduced and in effect admitted to be true. We pass then from this point in the case, to consider the questions arising upon the prayers for instruction to the jury, and the charge given.

In response to the first prayer, the county court might with propriety have informed the jury that the legal title to the personal property of one dying intestate does not vest in his distributees, and that the latter can only regularly acquire it through an administrator. 11 Ala. Rep. 609. Such a charge should have been given, if the plaintiff rested his right to recover upon his interest as a distributee. The court did not merely refuse the instruction, but charged the jury that the plaintiff could maintain the action "upon his possession derived as heir of his deceased brother, and as the bailee of his deceased brother." In thus laying down the law, does not the court invade the province of the jury, and forestal their inquiries, by assuming as a postulate, that the plaintiff had the possession of the slaves; and that his possession is referable to his relationship to W. P. McGrew, and to a bailment by the latter, to him? However convincing the evidence may be, it is not for the court to assert its truth; but it is the office of the judge to expound the law—the jury are to ascertain the facts. If the judge refer his duties to the jury, or undertake to perform theirs, in either case he commits an error. 2 Ala. Rep. 310. We think it cannot

admit of serious controversy, that the charge is obnoxious to the objection intimated. If the jury deferred their judgment as to the conclusions inferrable from the facts to the judge, they would have had little else to do, than ascertain the respective value of the slaves, and assess the damages for their detention. They were told that the plaintiff had the possession, and it is intimated in no equivocal terms, that his possession was as next of kin and bailee of his deceased brother. These we have seen were conclusions dependent upon facts which the jury should have scanned.

In *Traylor v. Marshall*, 11 Ala. Rep. 458, it was said the plaintiff in *detinue* must prove either a general or special property in the chattel, and a right to the immediate possession. A bailee may maintain *detinue* or *trover* against a stranger who takes the goods out of his possession; and this whether the bailment be general or special, gratuitous or for a reward. So may a factor, or other consignee, pawnee or trustee. We said further, that in general, possession of a chattel is *prima facie* evidence of property in the possessor; but if the plaintiff has never had possession of the chattel, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title, unless the plaintiff can prove a better, it is necessary for the latter to resort to strict evidence of title. If therefore the action be brought against a wrongdoer, the mere fact of possession by the plaintiff is usually sufficient evidence of title, although the plaintiff claim under a title which is defective; for the possession of property is *prima facie* evidence of ownership. These conclusions, it will be seen by a reference to the authorities on which the opinion of the court is rested, are well sustained.

If, then, the slaves were in the plaintiff's possession under an agency to hire or take care of them, commencing in the lifetime of W. P. McGrew; or even if he had been in possession of them from 1838 to 1845, as the proof indicates, and they were taken from him by one having no title, he would be entitled to maintain the present action. The relation of the defendants to W. P. McGrew did not authorize them to disturb the plaintiff's possession, either by enticing or otherwise taking the slaves from him; and unless they show a superior legal right, they cannot justify their retention, although

they may have had no agency in inducing the slaves to leave the plaintiff.

In respect to the question of a gift by W. P. McGrew to the defendant Levin, it may be quite enough to say that it wants one of the essential elements of a gift—delivery of the thing, or something which the law deems equivalent. The supposed donor does not appear to have parted with his dominion over the slave, but could have reclaimed her at any time up to his death. Taking all the evidence, and giving to it an interpretation most favorable to the defendants, and it merely indicates an intention to give upon a contingency. But the purpose was never consummated—the *locus penitentiæ* was never closed, and no advantage can be claimed from it. 1 Smedes & M. Rep. 428; 3 Stewt. Rep. 121; 1 Stewt. & P. Rep. 56; 2 Port. Rep. 449; 1 Ala. Rep. 52; 2 Id. 117.

An adherence to the views we have laid down, will enable the primary court to dispose of this case understandingly; and we have but to add, that the judgment is reversed, and the cause remanded.

NELSON & HATCH v. DUNN.

1. When upon the purchase of a plantation and slaves, on credit, a number of notes are executed, falling due during a series of years, if the maker discharges, or pays the notes first falling due, to the payee, he will be presumed to have availed himself of any payment, or off set, which then existed, and will not be permitted to make such a defence against an assignee of notes subsequently falling due.
2. If the notes so paid off by the maker, were assigned previous to payment, it was his duty to make the fact appear. Such assignment cannot be inferred from the declaration of the maker at the time of the execution of the notes, that he intended to transfer them.

Error to the Circuit Court of Sumter. Before the Hon. S. Chapman.

THE defendant in error declared against the plaintiffs, on a promissory note, dated — day of June, 1840, for six thousand dollars, due the 1st of May, 1844, made by defendants, payable to the order of A. Henderson, and by him indorsed to the plaintiff below. At the fall term of the circuit court, a trial was had, and a verdict returned for the plaintiff, for the amount of the note and interest. Thereupon judgment was rendered. During the trial, the presiding judge sealed a bill of exceptions, which presents the following facts: It was shown by defendants, that in June, 1840, Nelson & Hatch purchased of Alexander Henderson, the payee of the note, a tract of land and about ninety slaves, together with the stock, farming utensils, &c., for which they executed ten notes, one due May, 1841, for \$5000, one due the first of May, 1842, for \$6000, one in May, 1843, and one in May, 1844, being the note sued on, for \$6000; one falling due on the first of May, each year, for \$6000, until the year 1850, and the note of that year being for \$7000; and the last note, falling due 1851, for \$21000, to secure the payment of which, Nelson & Hatch executed a deed of trust on the property purchased of Henderson. The deeds of conveyance from Henderson to Hatch and Nelson, were proved, and the deed of trust by Nelson & Hatch to Henderson. The witness stated, that the value of the slaves were estimated by him, at the request of the vendor and vendees. That he wrote down the name of each as they passed before him, and also the estimated value of each. That the value of the slaves was affixed by him, upon the supposition that they were sound, except two slaves; that the vendor and vendees afterwards, in closing the contract, made some alteration in the value attached to some of the slaves, Henderson objecting that some had been priced too low, and Nelson & Hatch that some had been priced too high; but witness did not remember what particular alteration had been made. Henderson, the vendor, gave no information to the vendees, that any of the slaves were unsound, except the two referred to. That Hatch resided about three miles from the plantation, and Nelson about fifty, and had been on terms of intimacy with Henderson.

It was also proved, that four of the slaves priced by Garrett, the witness, as sound, at the time of the sale, and a long time previous, were unsound, with incurable diseases, which could not be discovered by external observation, and that said slaves presented the appearance of being sound. That the value of said four slaves was impaired by reason of their disease, to the amount of \$1200, and the evidence conduced to show, that at the time of the sale, the vendor knew they were diseased. It was also shown, that one Hatch, the brother of one of the vendees, was then, and had been, the overseer of Henderson, and was present at the sale. Also, Dr. Dalton, the son-in-law of Henderson, who had had said four slaves under his care, came up during the time the trade was going on, but it did not appear that the vendees had any conversation with them about the slaves. That Henderson was a partner in a commission house in Mobile, where he spent most of his time, but visited his plantation occasionally.

The defendants also proved, that the property purchased by them of Henderson, was all he had in Alabama. That at the time of the sale, Henderson did not think he was insolvent, but it turned out that he was, and so continued till his death. That at the time of the sale, Nelson, one of the defendants, and one Chalmers, were the securities of Henderson to one Physic, on a note for \$3339 25, dated 5th July, 1839, with interest from date. That Nelson was then sued on this note, in the county of Greene, and on receiving the above mentioned notes of Nelson & Hatch, for the purchase money of the property, Henderson remarked, he should transfer the notes in payment of his debts, and that Nelson & Hatch might consider them as transferred; when Nelson remarked, I am now sued as your security on the Physic debt, and you have made no arrangement for its payment. Henderson replied, I wish you to defend the suit, and keep off the collection as long as you can, and when judgment is recovered against you, you shall be protected out of some one of the notes, falling due about that time. Some conversation took place as to how long the debt could be postponed. It was supposed the suit then pending, could be defeated, and that it would take from two to three years before the

judgment would be obtained. The suit then pending was defeated, another suit on the debt instituted against Nelson, judgment obtained in the fall of 1841, and he was compelled to pay on the execution, in March, 1842, \$4231 96. The defendants also proved, that they had paid the two first notes by producing and identifying them, viz: those falling due in 1841 and 1842. That the third note was assigned to secure some creditors of Henderson in North Carolina, and was sued upon, but when it was assigned did not appear. That the note sued on, and the three next falling due, were assigned to the plaintiff for the purpose of collection, and when collected to be applied to the payment of certain enumerated debts, *pari passu*, named in the instrument of assignment, and amongst which debts was named the Physic debt, that Nelson was sued on as security for Henderson, and had to pay as stated. This assignment was made by deed, and bears date October the first, 1840. The plaintiff at the same time gave a receipt to Henderson for the notes, specifying he had received them for collection, and when collected, the proceeds to be paid to the creditors named in the deed of assignment, *pari passu*, and without preference. It was also shown, that in the latter part of the winter of 1840, or the spring of 1841, Nelson & Hatch were notified of the assignment above referred to, of these four notes to plaintiff. There was evidence that Henderson hired of Nelson & Hatch two horses and two servants, to make a trip to North Carolina, in June, 1840, with an agreement that if they were not returned, Henderson would pay their value. That he kept them four or five months, their hire being worth \$30 per month. That he never returned the horses, but in the fall agreed that the value of one horse was \$90, the value of the other, \$75. It was also shown, that in 1842 he hired two other servants of defendants, for about three months, and that their hire was worth about \$31 per month. It was also shown, that one Stone held a note on Henderson, and being about to arrest him, on the 6th March, 1841, he drew a draft on the defendants for \$835 92, in favor of Stone, which the defendants accepted, due the 15th January, 1842, and at maturity it was taken up by the defendants drawing on their commission merchant in Mobile, which last was paid out of their

own funds. It was also in proof, that of all the foregoing defences the plaintiff was notified before the trial, in writing, which was accepted as a notice of off sets. It was also shown, that the defendants had taken up, or had transferred to them, several of the debts intended to be secured by the deed of assignment of the notes transferred to Dunn, as stated.

The court charged the jury, that the evidence was insufficient to prevent a recovery on the note sued on, to which charge the defendants excepted, and here assign for error, the charge given on the evidence, as shown by the bill of exceptions.

ORMOND and SMITH, for the plaintiff in error, made the following points:

1. The assignment to Dunn is a mere naked power, and whether he is considered as an assignee under the statute, or as the assignee of a *chose in action* at common law, he occupies the same condition as his assignor. Walker v. Miller, 11 Ala. 1083; Bank of Mobile v. Hall, 6 Id. 639; Hale v. Jackson, 20 Pick. 194; Brooks v. Marbury, 11 Wheat. 78; Story on Agency, 507.

2. The agreement between Henderson and Nelson & Hatch, at the time of the execution of the notes, in regard to the Physic debt, for which Nelson was bound as surety, created an equity in favor of Nelson, which attached to the debt, and will follow it in the hands of the assignee. Smith v. Pettus, 1 S. & P. 107; Andrews & Brothers v. McCoy, 8 Ala. 929; Norton v. Rose, 2 Wash. Rep. 234; Murray & Winter v. Lebburn, 2 Johns. C. 441; Livingston v. Dean, Id. 479.

3. The omission of Henderson to disclose the unsoundness of the four female slaves, was a fraud which may be relied on in the reduction of the damages, as the plaintiff has no other rights than Henderson would have were he prosecuting this suit in his own name, and the same is true of the off sets.

4. They contended that the plaintiffs in error had the right to make these defences against any of these notes, as the defence is not to any particular note, but to the entire contract evidenced by all the notes.

5. In reply to the authorities cited from 12 Wendell, 356, and 6 Dana, 223, they insisted they were not analagous because it was not shown that the two first notes taken up by Nelson & Hatch, were paid to Henderson, and the inference from the whole record is, that they were assigned by Henderson, as he was insolvent, and all the rest of the notes were proved to have been assigned.

6. Lastly, they contended, that this record must not be considered as if the plaintiffs in error had demurred to the evidence in the court below, and thereby subjected themselves to all the inferences which the jury might make, but that the precise converse of this proposition was the true rule in this case, as the act of the court in withdrawing the case from the jury, could only be justified upon the hypothesis of a demurrer by the plaintiff to the evidence. That as the record did not state that the two first notes were paid by Nelson & Hatch to Henderson, this court could not infer the existence of such a fact, which, if it existed, and was important to the plaintiffs, should have been shown by them. That in thus drawing inferences from the record, the appellate court would necessarily encounter the hazard of deciding the cause upon a point not made in the court below, considered of no importance by either party, and therefore imperfectly stated upon the record.

HOPKINS and MANNING, for defendants.

1. There is no warranty, or false representations; the vendees could have inquired for themselves—and even if the evidence tended to show, that Henderson knew of the unsoundness of the slaves, he was not bound to communicate it. 2 Ala. R. 151; 3 Ib. 357; 17 Mass. 267.

2. The defence of the failure of consideration cannot be made at law. There was an entire sum given for the land and negroes. The sum was divided into eleven notes, falling due, one annually, and consequently this partial failure of consideration diffused through each note, and in proportion to the amount of each, and it would require eleven trials to ascertain the amount of the failure of consideration.

3. If this failure of consideration could be pleaded at law, the defendants were bound to adjust it with Henderson, on

the two first notes, and it would be inequitable to permit them to pay them to Henderson in full, after notice of the transfer to Dunn, and then permit them to rely on this defence to the notes in plaintiff's hands. 5 Johns. Ch. R. 235; 9 Cowen, 403; 1 Ran. 466. And the same rule should apply to the sets off. 12 Wend. 356; 6 Dana, 223.

4. The presumption of law is, that all those demands, by way of sets off and failure of consideration, have been compensated and satisfied in the settlement of the two first notes that were produced by the defendants, and paid by them, as they now contend. And taking all the facts to be true, as stated by the proof, the charge of the court was correct.

DARGAN, J.—It is necessary to ascertain, in the first place, the nature of the title of the plaintiff, to the note declared on, as that will aid us in coming to a correct conclusion, whether any of the defences relied on should have been allowed. Henderson, the payee of the note, sold to the plaintiffs in error, in June, 1840, a plantation and about ninety slaves, stock, farming utensils, &c. They executed to him eleven promissory notes, the first falling due the first of May, 1841, and was for \$5,000; one falling due on the first of May of each year afterwards, each for \$6,000, except the two last notes—one of these was for seven, and the other for \$21,000. The notes due the first of May, 1844, 1845, 1846, and 1847, were assigned to the plaintiff, by Henderson on the first day of October, 1840, by deed, for the purpose of securing certain debts named in the deed of assignment—the plaintiff at the same time, giving Henderson a receipt for them, by which he undertakes to collect the notes, and apply the proceeds in the manner specified in the deed. The notes were also indorsed by Henderson to the plaintiff, but nothing passed from Dunn to Henderson, except the receipt, which was merely an undertaking to collect the notes, for the purposes indicated in the deed of assignment.

In what condition, then, does Dunn hold the notes, or what is the nature of his title? He is not a *bona fide* holder for value, in the mercantile sense of that term, for he has parted with nothing of value; he has paid nothing for them,

and it is now well settled, that the holder of a note, merely as security for the payment of a debt of the maker, is not a *bona fide* holder according to the meaning of that term in the law merchant. But that such a holder takes the note, or bill, subject to all equities existing against it, at the time he receives it, see 6 Ala. Rep. 634, and the cases there cited.

But the law permits a debtor to dispose of his property, with the view, and for the purpose of securing the payment of his debts, and when once he has so appropriated his property, the rights of his creditors intended to be secured thereby, attach upon it, and if it is conveyed to a trustee, who assents to the conveyance, and by virtue thereof takes possession of the property, can such a trustee be said to be a mere holder without consideration? What is the consideration of such a conveyance? It is to secure the payment of the debts of the grantor, and the trustee assenting to it, undertakes to perform his duties according to the terms of the deed. Such a conveyance cannot be said to be without consideration, but is founded on such a consideration as the law deems valuable; and the deed will be sustained for the purposes for which it is intended. As the law will sustain such a deed, and will coerce the trustee to perform the obligations he has assumed, the title to the property passes from the grantor for a lawful purpose, and on a consideration that will support the deed; and therefore the vendor cannot revoke the deed, nor reclaim the property, unless by paying the debts secured by it. The conveyance, then, to Dunn, and the indorsement of the notes, gave him a title to the notes, that could not be defeated by Henderson.

Nor could the defendants prevent Henderson from making such a disposition of the notes, nor defeat the transfer, by obtaining other offsets against Henderson, after notice thereof was given them. Dunn therefore holds the legal title to the notes, for a legal purpose, which purpose, neither Henderson nor the defendants can defeat.

We will now proceed to the defence relied on. First is an offset for the hire of horses, and two servants, in the year 1840. The horses were not returned, and their value was agreed on—the amount of this offset being something like \$250. The next is, that four of the female slaves were un-

sound, and their value diminished thereby \$1,200. The next is a debt that Henderson owed to Physic, on which Nelson was security, and which he was compelled to pay—this amounts to \$4,231 95. This was paid in March, 1842, by Nelson, but the obligation of Nelson to pay existed before the notes were assigned, or before they were given. It was also shown that Henderson drew a draft on defendants for \$835 92, in March, 1841, payable in January, 1842, which they accepted and paid at maturity. These counter claims, or demands against Henderson, amounting to about \$6,500, the defendants say, they can assert against the note sued on, in the hands of the plaintiff, first by virtue of our statute, which allows them to assert all offsets, payments, or discounts, against the assignee of a note, (not negotiable in bank,) which they had against the payee before notice of the assignment; and they also say that the nature of Dunn's title to the notes, is such, that they could assert those claims against Dunn, even by the law merchant, as he is not a *bona fide* holder of the notes in the legal, mercantile sense of that term. If there should be found no controlling principle of law that prohibited the defendants from interposing these claims by way of offsets, or abatement of the note, I should fully assent to both these propositions, unless indeed there be some of the claims, which could not be asserted against Henderson. But the evidence presents also these facts: the defendants produced in court as paid, the two first notes, the one due in May, 1841, and the one in May, 1842, which amount in the aggregate to \$11,000. To whom they were paid does not appear, nor does it appear they were ever assigned. The third note is not paid, but is assigned for the purpose of securing other creditors. It also appears, that the defendants had notice of the assignment, before the first note fell due, and that Henderson in fact was insolvent at the time of the giving of the notes, and died insolvent, and the plaintiff says, that under these circumstances, the defendants ought not to be allowed to assert these counter claims against this note. That they had notice of the transfer, before they paid any money to Henderson. That they paid the two first notes without asserting those claims against him, (if indeed those claims have not been already compensated, or allowed

in the payment of those two notes,) and that it would be inequitable, and unjust, to permit them to insist on these claims now, as offsets to this note. In the case of *Callers & Winslow v. Allen*, 12 Wend. 355, it was said that where two notes are held against one man, and he has a demand against the payee, sufficient to extinguish one note, and the payee transfers one note, and retains the other, that this demand held by the payor against the payee, cannot be asserted against the holder, although he has received the note after due, and therefore he held it subject to all the equities existing against the note at the time of the transfer. So in 6 Dana, 223, it was held, that where a party has given several obligations, some of which are held by an assignee, and some by the payee, and the debtor has an offset against the payee, that he shall not assert his offset against the assignee, in the absence of proof that there was any agreement that his demand should be an offset against the note or obligation assigned, whilst the obligee or payee holds a debt against him equal to the offset.

If these authorities are just expositions of the law, of course it would follow, that if the debtor, after notice of the assignment, pay the payee in full, and neglect to have his offset adjusted, he could not be permitted to assert that offset against the assignee. These authorities appear to me to be just; they are in unison with the maxim, *sic utere tuo, ut alienum non lædas*. Here Henderson had assigned the four notes falling due May, 1844, 1845, 1846, 1847, for \$6,000 each—they are insufficient to pay in full the notes intended by them to be secured; the defendants knew they were assigned to pay those debts named in the deed; they had the legal right to have their claims or offsets adjusted, and paid in the settlement of the two first notes held by Henderson. They waive their legal right, and now wish to assert this right to the prejudice of the creditors, who have no other fund to look to for payment, and who have not been guilty of any negligence. I do not think they ought to be permitted. If the demands have not been compensated, they now attempt to use as offsets, it has been either from negligence to their own interest, or from a waiver of their rights against Henderson in the settlement of the two first notes, and cer-

tainly it is not unjust to make them bear the consequences of their own act, or omission. Nor can the fact that they have purchased some of the debts secured by the deed to Dunn, enable them to plead these debts as offsets. The deed contemplates, that the debts named in it should be paid from the proceeds of the notes *pari passu*, and without preference; but to permit the defendants to buy up part of the debts secured by the deed, and to have the whole allowed as offsets to the notes conveyed, would be, to give the debts obtained by the defendants, a preference over the others, and thereby to change the terms of the deed, or to defeat one of its objects—that is, the debts intended to be secured by it, should be paid *pari passu*, and without preference. The defendants cannot gain a preference by buying up the debts, to pay which the notes were assigned.

The charge of the court was, that the evidence was insufficient to prevent a recovery on the note. Under this charge, if by possibility the jury could have allowed any one of the debts, here attempted to be asserted as offsets, in accordance with the rules of law, as here laid down; or if there was the slightest conflict in the testimony, the cause would be reversed. But not one of those claims should have been allowed as offsets; there is no conflict of testimony, unless it could be said to exist as to the unsoundness of the four slaves, and this case is decided, as if the defendants had the right to claim the abatement of \$1,200 against Henderson; therefore the judgment of the circuit court cannot be reversed. The propriety of this course is fully shown by the case of *Simms v. Simms*, 2 Ala. Rep. 117, and the case of *Ralston v. Cullem & Smith*, decided at the last term of this court, and *Swift v. Fitzhugh*, 9 Porter.

The judgment is affirmed.

COLLIER, C. J.—I concur in the conclusions expressed in the opinion of my brother DARGAN, and beg leave to subjoin a remark or two. It cannot be inferred from the declaration of Henderson at the time the notes were delivered to him, that *he intended to transfer them, and that the makers might consider them as already transferred*, that he did in fact dispose of his right to them. An expressed intention to

do an act, in the absence of all evidence that it was done, certainly does not prove that the purpose of the declarant was consummated. He may have taken advantage of the *locus poenitentiae*, as it was allowable to do; and it is too much for any tribunal, where the inquiry becomes material, to assume that he did not.

It is explicitly stated that the two notes which first matured, were payable to the *order* of Henderson, and were produced by the defendant as *evidence* of their having been paid. Upon this statement, it cannot be inferred that the notes were indorsed or otherwise transferred by the payee. If they had not been indorsed, the intendment would be that they were paid to Henderson, in the absence of all proof on the point.

Uninfluenced by our statute, it may perhaps be conceded that a check or note payable to a certain person *eo nomine* or bearer, is not evidence *per se* of payment to the person whose name is inserted; because such a paper on its face would be payable to any person who might become its proprietor. If the note in question was ordered to be paid to some third person, either by a written or verbal transfer, or was in fact paid to some one else than the payee, it should have been proved. 7 Sergt. & R. Rep. 124 to 126.

Although, it is generally most proper to instruct the jury hypothetically upon the facts, I cannot think the evidence was so contradictory as to make the sweeping charge that was given erroneous. If the evidence had been demurred to by the plaintiff, it could not have been presumed in the absence of, if not against proof, that the notes which the defendants paid, had been transferred by the payee. Whether this was deemed an important inquiry in the primary court in the present posture of the case, can have no influence in determining what judgment we should pronounce. We must look at the record as it is presented to us, and from the disclosures there made, we must form an opinion whether the ruling of the circuit court should be supported.

Considering the agreement in respect to what has been

called the "Physic debt," however the law may be on a demurrer to evidence, I think a jury might very well infer that it had been deducted against one of the notes maturing about the time that Nelson paid it.

If what I have said be maintainable, the cases cited in the opinion of the court from 12th Wendell and 6th Dana are directly in point. I may add, that these cases rest upon a principle which has been too often recognized to be successfully combatted. See also Taylor's adm'rs, et al. v. Spindle, 2 Grattan's Rep. 44.

GOODWIN v. MCCOY.

1. When a party under the general issue, has the benefit of a defence set up by a special plea, he cannot complain of error in sustaining a demurrer to such plea.
2. At the time a bill of exchange was drawn, the drawer resided near Selma, where he had a plantation, and which was his nearest post office. That about two months before the maturity of the bill, he removed to Talladega county, with his family, some eighty miles distant, visiting his plantation occasionally, where his slaves remained; but there was no testimony, that the plaintiff, who resided in Mobile, knew of this removal, or of the residence of the drawer, further than might be inferred from his sending the notice to Selma. Held, that a notice of the dishonor of the bill, sent to him at Selma was sufficient, it not being shown that he had a fixed residence in Talladega.
3. If purchased bagging and rope from McC, who took his notes for the payment, and a bill of exchange as collateral security, and gave him a receipt, which stated the fact of the receipt of the bill as collateral security for the payment of the notes, and concluding, "the above acceptance of Thomas Haynes, to be given up on payment of above four notes." Held, that this did not make the bill conditional, or payable on a contingency, and that the proof of this fact was merely proving the consideration of the transfer of the bill.

Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

ASSUMPSIT on a bill of exchange by the defendant in error against the plaintiff in error. The defendant pleaded several special pleas, to which the plaintiff demurred, and the court sustained his demurrer.

Upon the trial, as appears from a bill of exceptions, the defendant proved the bill in suit was made and dated in Mobile, and handed to one Haynes, in blank, to enable him to purchase bagging and rope. That he purchased a quantity of bagging and rope from the plaintiff, for the payment of which he executed his notes, and filled up the bill, and handed it to the plaintiff as collateral security; the plaintiff at the same time executing to him a receipt, reciting the notes executed by Haynes, and that "the above acceptance of Thomas Haynes, was to be given up, on the payment of the above four notes."

It was in evidence, that the defendant was a planter, residing near Selma, at the time of the making of the bill of exchange, but that some two months before the maturity of the bill, he had permanently removed with his family to Talladega county, and was residing there at the maturity of the bill, and has resided there ever since. That his slaves made a crop near Selma, after his removal, he occasionally visiting his plantation. Notice of the dishonor of the bill was duly sent to Selma.

The defendant moved the court to charge, that there could be no recovery on the bill, until the plaintiff had employed due diligence to recover the notes of Haynes, which charge the court refused.

That if the bill was made for the accommodation of Haynes, and passed to the plaintiff as collateral security, he could not recover, unless he had employed due diligence to recover the notes of Haynes, which was refused.

That the facts as above stated, made the bill void in the hands of the plaintiff. That if, at the date of the bill, the defendant resided in Dallas county, that the bill was left with Haynes in blank, and he filled it up and dated it at Mobile, and passed it to the plaintiff, and that two months before the

maturity of the bill, he permanently removed with his family from Dallas to Talladega county, eighty miles distant from Selma, that a notice of the dishonor of the bill sent to Selma, was not sufficient. The defendant also repeated the facts stated in the last motion, for a charge, with the addition, that if the plaintiff had no knowledge of the defendant's former residence, or his removal, that then the notice sent to Selma was insufficient.

The court refused these charges, and charged in effect, that there was nothing in the testimony to prevent the plaintiff from recovering. The defendant excepted, and now assigns these matters, as well as the judgment of the court on the demurrers, for error.

W. H. FELLOWS, for the plaintiff in error.

From the testimony it appears, it was the intention of Goodwin to become the guarantor for Haynes, in the purchase of bagging and rope.

1. It is contended that no such intent can be collected from the face of the written contract. The whole agreement must be in writing, and must be signed by the party to be charged. Burge on Suretyship, 30, 31.

2. If the bill of exchange, on its face, cannot operate as a guaranty, there was no evidence to support the common counts. The bill of exceptions recites, that there was no evidence by any other witness, of any of the matters spoken of by Haynes.

3. The receipt given by the payee to the acceptor, rendered the payment of the bill of exchange contingent, and therefore void, as a bill of exchange. Chitty on Bills, 9 Am. ed. 154-5, and note, t.

4. The bill may be rendered contingent by a detached paper. Chitty on Bills, 9 ed. 160-1-2; Story on Bills, 46, § 34. The receipt entered into and formed part of the contract. If the entire contract had been on one piece of paper, it would be palpably no bill of exchange. The authorities say that it makes no difference that it is on two.

5. The bill was void, as such, in the hands of the payee. Chitty on Bills, 9 ed. 164-5; Robbins v. May, 39 E. C. L. 50, 51.

6. The holder was bound to use diligence to notify the drawer. Chitty on Bills, 525; Crawford v. The Bank, 7 Ala. Rep. 205; Story on Bills, 334, § 299; 331, 346, § 315; Blakely v. Grant, 6 Mass. 386.

7. It is no part of the duty of a notary to give notice, and no presumption can arise that he knew the drawer's place of residence.

8. If the notice of protest is sent to the wrong place, and no inquiry be made, the drawer will be discharged. Spencer v. Bank of Salina, 3 Hill's N. Y. Rep. 520.

9. The cases of McMurtre v. Jones, 3 W. C. C. R. 283, and Utica Bank v. Hall, 3 Wend. 408, are cited by the American editors of Bailey on Bills, at page, 283. Those cases show that some diligence was used to notify the party.

Judge Story has cited the same cases three times in his work on Bills of Exchange, § 297, 351, and he lays down a different rule from that laid down by the editors of Bailey on Bills. See also the case of Spencer v. Bank of Salina, 3 Hill's N. Y. Rep. 520.

The court below charged, that there was nothing in the testimony of Haynes to prevent the plaintiff from recovering, and that the notice of protest was sufficient. This charge was equivalent to charging, that if they believed the testimony they must find for the plaintiff. The charge was so understood by the court and the jury did not retire.

The written testimony of Haynes contained the written contract of McCoy, rendering the bill of exchange payable upon a contingency.

J. W. LAPSLEY, for defendant in error, made the following points:

1. As to the second plea, it is bad because it don't preclude the idea that the bill declared on was received by the plaintiff in the usual course of trade without notice. Nor does this plea alledge that the bill was written over the blank, or that the blank was used in making the bill.

2. The third plea is bad for want of an averment, that the blank to which the plea refers was used in making this bill; nor is it stated in what manner the blank was used.

3. If the second and third pleas were good, still the defendant was not prejudiced by the judgment sustaining the demurrers, for the matter was good under the general issue, and the bill of exceptions shows, that the defendant had the full benefit of the defence set up; that no part of his evidence was excluded for want of pleas. *McKenzie v. Jackson*, 4 Ala. 230; *Shehan v. Hampton*, 8 Ib. 943.

4. The bill declared on, it is contended by the plaintiff in error, was a collateral, received for a pre-existing debt. This is not the case, as shown by the proof of the defendant in the court below. It is true, the witness, Haynes, in his deposition, set out in the bill of exceptions, calls it a collateral, and the plaintiff, in the receipt given by him to Haynes, speaks of the bill as collateral to certain notes of Haynes held by the plaintiff, McCoy. But that is not the criterion by which to judge of the character of the bill, which must be construed by the facts connected with its making and transfer, which are fully stated in the deposition of Haynes, the witness of the defendant, Goodwin.

5. Goodwin was originally liable on the bill to McCoy, who was under no obligation to bring suit against Haynes, to whom the credit in fact was not given. Haynes, as acceptor of the bill was bound to McCoy for the amount of the bagging and rope, so that there was no reason in any event why McCoy should wish his notes, which were given, as Haynes states, for his own accommodation. See *Swift v. Tyson*, 16 Peters, 1, and *Holcombe's Leading Cases*, 224.

6. Under the facts as presented by the bill of exceptions, it is considered wholly unnecessary to discuss the point, whether paper received in the usual course of trade, as collateral to a pre-existing debt, and without other consideration would be valid and binding on the maker.

7. If a merchant receives a blank, to be used in his purchases, without restriction as to the manner of its use, and he does use it as a security in making his purchases, the maker is bound to the holder so receiving it. This we think is very clearly a correct legal proposition, and applies to the case.

8. As to the special charges asked by the defendant below, founded on the supposition that the bill declared on

was received by the plaintiff merely as collateral security to a pre-existing debt of Haynes, they were properly refused, if for no other reason, because they were abstract and founded on hypothetical facts, which the proof shows did not exist in this case. But the charges might well have been refused on other grounds.

9. As to the notice. The notice proved is sufficient. All the law requires is reasonable diligence. A notice sent to the place where a party to a bill or note resided at the time it was made, or taken by the holder, is sufficient, although the party may have removed to another place before the discharge of the bill, if the holder does not know, and has no reason to suspect the change of residence. Bayley on Bills, 383; Bank of Utica v. Phillips, 3 Wend. 408; McMurtre v. Jones, 3 Wash. C. C. R. 206. Downer v. Remer, 21 Wend. 13, overrules Cuyler v. Nellis, 4 Wend. 398, quoted by the plaintiff in error.

It is shown that the drawer continued to reside near Selma (which was his nearest post office at the time the bill was drawn,) until within two months of the maturity of the bill, and kept up his plantation near Selma until after the bill became due. The holder resided in Mobile, about 170 miles from Selma. There is no evidence conducing to show, that the holder knew, or had any reason to suspect the change of residence of the drawer, or that there was any thing to put him on the inquiry. In sending the notice therefore to Selma, the holder used all the diligence the law required. The bill being dated at Mobile, under the circumstances, signifies nothing. Lowry v. Scott, 24 Wend. 359.

10. The drawer, Goodwin, was not entitled to notice, for the reason that he had no funds in the hands of the acceptor. Stewart v. Desha, Sheppard & Co., 11 Ala. 848; Scott v. Lefford, 1 Camp, 247.

CHILTON, J.—Several decisions of this court are conclusive to show, that when a person entrusts another with his blank signature, to be filled up for a particular sum, or to be used in a particular manner, and it is filled up with a greater sum, or is used in a different mode than that contemplated, the paper, nevertheless, in the hands of a *bona fide*

holder, may be recovered upon. See authorities cited in *Decatur Bank v. Spence*, 9 Ala. R. 800. The second plea to which a demurrer was sustained, is evidently defective, as it does not aver any knowledge on the part of the holder of the paper, of the circumstances set forth to invalidate the bill, or that the character in which he holds it, or the means by which he acquired it, justified an inquiry into its consideration. The third plea was properly held bad, as it contains no averment connecting the blank signature of the defendant below with the bill sued upon. But it is unnecessary to go into an investigation of the merits of the pleas, as it is manifest from the record that the plaintiff in error has had all the benefit which he possibly could have had under these pleas, under the general issue which was sworn to, and having sustained no injury, he cannot be heard to complain. The rule is, that the party plaintiff in this court must show injury as well as error, to entitle him to a reversal. See *McKenzie v. Jackson*, 4 Ala. Rep. 230; *Shehan v. Hampton*, 8 Ala. Rep. 943.

2. Waiving the consideration of the question, whether the circumstances connected with the making and negotiating the bill in suit, coupled with the fact that a want of funds of the drawer in the hands of the acceptor, do not dispense with the necessity of notice of the dishonor of the bill to the drawer, (1 Camp. Rep. 247,) we will briefly proceed to state the grounds upon which we determine the notice which was given is sufficient to charge the plaintiff in error with the payment of the bill.

In due time after the maturity of the bill, it was regularly protested for non-payment by a notary public, who forwarded, by the next mail, notice of protest, directed to Selma, Dallas county, Alabama, to the address of the plaintiff in error. The bill of exceptions shows that the plaintiff in error was a planter, residing near Selma, his then nearest post office, at the time of the making of said bill of exchange, but that some two months before the maturity of said bill, said defendant had permanently removed to Talladega county with his family, and was residing in said county at the maturity of said bill, and has resided there ever since, but the defendant continued to own the farm near Selma, upon which

he had formerly resided, and his slaves, after his removal, made a crop there, he visiting the plantation several times, and remaining a day or two each time. That after his removal, Selma ceased to be his nearest post office by some seventy or eighty miles. It was also shown, the plaintiff resided in Mobile when the bill was protested, but there was no proof showing the plaintiff below knew of the removal of defendant, or that his residence was known to him, unless sending the notice to Selma is evidence of such fact of residence. This is all the evidence upon the subject of the drawer's domicile.

It is well settled, that a domicile once fixed, remains until a new one is acquired. *Jemison v. Hopgood*, 19 Pick. 77 : 11 Ib. 401 ; 11 Mass. 424. The permanent removal to Talladega county does not necessarily imply, that the party had a fixed residence in that county at any particular place, so that notice might have been transmitted to him. But he was "residing there at the maturity of the bill. How long had his residence been fixed there? It may be two months—one month—a day—we are not advised; and as the defendant below sought to avoid the effect of the notice, by showing a change of his residence, he who could have made the matter plain, should have done so. The fourth and fifth charges, which present the question of notice to the court, assume that the removal of the plaintiff in error, without regard to his fixed or permanent residence, would avoid the effect of notice sent to his former residence in Dallas. He may have changed his location daily in Talladega county, before acquiring there a fixed domicile, and a notice directed to any post office in that county, pending this period, would have been less likely to have reached him than if sent to his plantation.

The object of the law, in requiring notice to be given of the dishonor of the bill to the drawee, is to enable him to withdraw his funds from the hands of the acceptor, or, if he be a drawer for the accommodation of the acceptor, that he may promptly provide himself indemnity by suit. But while the rule has respect to the protection of the parties, it is not so stringent as to require the exercise of extraordinary diligence. It must receive a reasonable construction, adapted

to the general convenience of the mercantile world, and such as will clog as little as possible, consistent with a due regard to the safety of the parties, the circulation of paper of this description. In the *Bank of Columbia v. Lawrence*, 1 Pet. Rep. 578, the question of notice is discussed at some length. In that case, the defendant resided within three miles of Georgetown, which was his nearest post office, and at which the notice was left. Before the maturity of the bill, he had however resided in Washington City, where he had carried on the business of a morocco leather dresser, keeping a shop and he and his family residing in a house of his own. This house he still owned, and often rented it, (being in the occupancy of his sister-in-law,) settling up his old accounts, &c. The judge of the circuit court charged, that the notice should have been sent to Washington City, but the supreme court reversed the judgment, deciding the note sent to the post office at either place was sufficient. So, in the *Bank of Utica v. Philips*, 3 Wend. Rep. 410, where the defendant, after the indorsement, but before the maturity of the note declared on, removed from *Geddes*, in the county of *Onondaga*, to *Fulton*, in the county of *Oswego*, the holder, having at the time of the indorsement noted upon the paper his place of residence, caused notice of protest to be forwarded to *Geddes*, his former place of residence, having no notice of his removal. The court (*Marcy, J.*) held the notice sufficient, and say, "the question of diligence cannot arise except in cases where the party knows or ought to know that there is occasion for its exercise. Ought the holders of this note, when it fell due, to have known that intermediate its discount and maturity, the indorser had changed his residence? They had no reason to suspect such an event, and of course, no considerations of diligence could have prompted them to have instituted any inquiry in relation to it." See also *McMurtie v. Jones*, 3 Wash. C. C. Rep. 206; Baily on Bills, 283; Story on Bills, 230, 231, and note 2, where the authorities are collated. We are not, however, called upon to go so far as the court in the *Bank of Utica v. Philips*, and desire to confine our opinion to the facts of this case, resting it upon the ground that the isolated fact of the removal of the defendant, who was a planter, of his white family to Talladega, two months before the

maturity of the bill, leaving his slaves on the plantation, and showing no change in the mode of carrying on his business, to which he gives personal attention, is not of itself sufficient to avoid the effect of notice directed to that point.

3. It appears that at the time of the purchase by Haynes of the bagging and rope from the plaintiff, and the filling up the bill in suit, Haynes executed his four notes for the amount, and that McCoy, the plaintiff, gave him a receipt, in these words: "Rec'd, Mobile, 27 May, 1844, of Thomas Haynes, Esq. T. A. Goodwin's draft on Thomas Haynes, and by him accepted, payable 1-4 April, 1845, for twenty-five hundred dollars, as collateral security for the following notes: Tho. Haynes's note in my favor, due 15-18 Dec. '44, for \$642 31; note in my favor due 15-18 Jan'y, '45, for \$642 31; note due 15-18 Feb'y, '45, for \$642 32; another due 1-4 March, '45, for \$642 32. The above acceptance of Thomas Haynes, to be given up on payment of above four notes. (Signed)

FRANKLIN W. MCCOY."

It is contended by the counsel for the plaintiff in error, that this bill cannot be allowed to operate as a guaranty for the payment of Haynes's notes, as it is not apparent on its face that such was the intent of the parties, and that parol evidence is inadmissible to change the written contract. The answer to this is, that such proof is not necessary to entitle the plaintiff to a recovery upon the bill, and moreover, the only proof offered upon the subject was admitted upon the motion of the plaintiff in error, and he cannot complain of its admission. But the proof does not contradict the written instrument, it only explains the consideration upon which the bill was negotiated.

It is further insisted, that by the contemporaneous execution of the above receipt, the acceptance is qualified, and the bill is made payable upon a contingency, and cannot for this reason be recovered. Admitting that the bill, notes and receipts, all form but one contract between the acceptor and the plaintiff below, and that it is well settled law that the bill must be payable absolutely and at all events, still we think the effect of this contract is not such as to make the paper, as respects the drawer or the acceptor conditional, or contingent in the sense as understood by the law. In what does

the condition or contingency annexed to this bill differ from that implied in every other? It is to be delivered up to the acceptor upon full payment. The bill sued, on and the four notes are given for the same consideration; the payment of the one cancels and discharges the others. If this constitutes it conditional and contingent, then every bill drawn in sets after the usual form, would be liable to the same objection; for each of the set is made payable upon condition the others of the set have not been paid. So in the bill before us, construed in connection with the receipt, it is to be paid absolutely and at all events, but if the acceptor pays the debt for which the bill is given, then of course it is discharged, and to be returned to the acceptor. The liability of the drawer is in no manner affected. His undertaking is always collateral to that of the acceptor, being chargeable, *if* the acceptor fails to pay.

But if we allow the position of the counsel to hold good, that the bill is rendered contingent by this arrangement, still the charges asked by the plaintiff in error, presenting this feature in the case, were properly refused, as they denied the right of action altogether; whereas the contract, having been fully executed by the plaintiff below, and being perfectly legal and made by Haynes, as he proves with full authority from Goodwin thus to bind him, is certainly evidence under the common counts, and in connection with the other proof, fully justified a recovery, if the jury believed the credit was given to Goodwin, the plaintiff in error, although Haynes received the bagging and rope, and bound himself likewise to pay.

It does not follow, however, that a partial or conditional acceptance renders the bill, which is not payable upon a contingency but absolutely, inoperative against the drawer. The duty of the holder, if he take such conditional acceptance, is to give immediate notice to the drawer of the character of the acceptance. Chitty on Bills, 300; Payton v. Winter, 1 Taunt. Rep. 422. If it be replied, no such notice was given in the case at bar, the answer is, Haynes was the agent of Goodwin the drawer, to fill up the blank and negotiate the bill, and with full authority to make the arrange-

ment as it was consummated. The drawer must then be considered as having notice of the terms of the acceptance, the drawing and accepting the bill being contemporaneous acts.

We will not pursue the subject further. The conclusions attained by us, show the charge given by the court was unexceptionable, and the charges asked were properly refused, and that there was no error of which the plaintiff in error can complain, in sustaining the demurrer to the pleas.

Let the judgment be affirmed.

McCOLLUM v. HUBBERT AND CAPLE.

1. A variance between an execution, and the judgment to enforce which it was issued, does not render the execution a nullity, as it may be amended, so as to conform to the judgment.
2. The certificate of the clerk of the supreme court, that a judgment of the primary court had been affirmed on error, is *prima facie* evidence of the fact.
3. P, as sheriff, sold certain land, and after the sale, by a parol, or verbal contract, acquired an interest in it, which interest he afterwards by parol, sold to one A for a sum of money, and a house and lot, which was conveyed to him—Held, that he was an incompetent witness for the plaintiff, the purchaser of the land, to prove the levy of the *fi. fa.*
4. The refusal of the court to permit the sheriff to amend an execution, pending the trial of a cause, cannot be assigned for error upon the judgment in the cause.

Error to the Circuit Court of Fayette. Before the Hon. S. Chapman.

THIS was an action of Trespass at the suit of the defendants in error to try titles to several adjoining tracts of land situated in Fayette county. The cause was tried on the plea of "not guilty," averdict returned for the plaintiff, as-

sessing his damages at two hundred dollars, and judgment thereon rendered. A bill of exceptions was sealed at the defendant's instance, which presents the following points: 1. The plaintiffs claimed the land in question as purchasers at a sale made by the sheriff, under writs of *fieri facias*, and produced a judgment in favor of Henry S. Simonton, for the use of James A. McLester, and a *fi. fa.* in favor of James A. McLester, assignee. To the admission of this *fi. fa.* the defendant objected, because it did not conform to the judgment; but his objection was overruled. 2. The plaintiffs also offered a judgment and execution in favor of James Hogan, executor of Reuben Jones; this judgment had been affirmed on error, by the supreme court, as was shown by a recital in the execution, and the certificate of the clerk of this court. The defendant insisted, that the record of the judgment of the supreme court should be produced, to authorize the admission of the execution; but the court overruled the objection, and permitted the evidence to go to the jury. 3. R. H. Poe, the sheriff, who sold the lands, was offered as a witness to prove the levy of the *fi. fa.*, the sale and deed which he made to the purchaser. This witness stated, that at the time of the sale, which was on the 5th October, 1840, he was not interested in the purchase of the lands; but previous to the execution of the deed, which was on the 19th of the same month, he acquired an interest of one-third. Subsequent to the latter day, he sold his interest to one Abernathy, for a house and lot, and one hundred and seventy dollars in cash. The transaction between witness and Abernathy was by parol, but by direction of the latter, witness received a title to the house and lot from a person in whom it was vested. Upon these facts the defendant objected to the competency of Poe as a witness; but the objection was overruled, and he was permitted to testify. 4. Pending the trial, the defendant moved the court to permit the sheriff to amend his return upon the executions, which, for certain reasons stated, was refused. These several matters are now assigned as error.

B. F. PORTER and BRODIE, for the plaintiff in error, cited

1 Nott & McC. Rep. 408 ; 2 Id. 299 ; 7 Hals. Rep. 182, 326 ;
1 Missouri Rep. 246.

E. W. PECK, for the defendants in error.

COLLIER, C. J.—1. If the execution at the suit of McLester against the defendant should have been rejected because it varied from the judgment, it may well be questioned whether its admission prejudiced the defence. The judgment and execution in favor of Hogan, were sufficient to sustain the sale and sheriff's deed to the plaintiffs. But be this as it may, the variance did not make the execution an absolute nullity. In Cawthorn v. Knight, 11 Ala. R. 579, it was held, that courts, in virtue of their power over process issued by them, or their officers, without the aid of legislation may amend an execution by striking therefrom the name of a person who is improperly joined as a defendant with several others, without impairing its validity as to those against whom it should have issued. A misnomer on a *ca. sa.* has been amended after it has been executed. 4 Taunt. R. 322 ; Barnes' Notes, 10. And an amendment has been allowed, so as to make the amount agree with the judgment, where it is variant. 1 Chit R. 349. So an execution tested after the plaintiff's death, has been amended to make it conform to the truth of the case. 6 T. Rep. 368, 450 ; 1 Cow. Rep. 33. In the case cited from 11 Ala. Rep. *ut supra*, we say it is difficult to prescribe limits to this salutary power possessed by the courts, of permitting amendments in their process, whether *mesne* or *final*. It was then, clearly competent for the circuit court to have directed the execution in favor of McLester, to have been so amended (if necessary,) as to conform to the judgment upon which it was founded ; and it should not have treated it as a nullity—furnishing no authority for the levy and sale.

2. Was not the recital in the execution in favor of Hogan, that the judgment in that case had been affirmed by the supreme court, *prima facie* evidence of the fact ? If, however, other evidence of the fact was necessary, the certificate of the clerk of this court is altogether sufficient. This is an official paper, which he is required by statute to make as a di-

rection to the primary court in its further proceedings. If there was an issue involving the identity or verity of the record, perhaps an exemplification of the transcript from the appellate court might have been required ; but in the posture of the case at bar, no such requisition could be made. See 3 Stew. Rep. 54.

3. We think the sheriff, Poe, was an interested witness for the plaintiffs, and his testimony should have been excluded. Although the contract between himself and Abernathy was by *parol*, or even *verbal*, yet *prima facie*, it imposed on him the duty of reconveying the house and lot, and refunding the money, or of conveying his interest in the lands in question to Abernathy. This proposition seems to us too plain to require illustration, and is perhaps best proved by its mere statement. If this be so, the witness will be bound to return to his vendee what he has received from him, or be otherwise chargeable upon his contract, and lose all interest in the lands if the plaintiffs are unsuccessful ; but if the plaintiffs recover, then he will retain the house and lot, and money, and Abernathy will take his interest in the lands. Thus we see, if the party calling the witness, succeeds, the witness will hold property and money to a considerable amount, but if the opposite result takes place, he will lose all without the prospect of re-imbursement. Here is not the case of an *equilibrium* of interest, but a clear preponderance in favor of the party who is seeking the benefit of the testimony.

4. The refusal of the court to permit the sheriff to amend his returns to the *fi. fa*'s. was not the decision of a point arising upon, and pertinent to the trial ; but was an independent and collateral matter. The amendment was asked by the defendant that the proceedings under the executions might be truly shown. This motion should have been made before the trial was entered upon, (though perhaps it might be competent to give leave to amend at any time,) and if improperly denied, it could be enforced by some direct proceeding ; but for the reasons stated, it cannot be assigned for error in the present case. For the error in the admission of Poe as a witness, the judgment of the circuit court is reversed, and the cause remanded.

COCKE v. CAMPBELL & SMITH.

1. When power is given to an agent to sell a slave, an authority is implied to make to the purchaser a warranty of title, and soundness.
2. An agent authorized by parol to sell a slave, cannot execute a warranty of soundness under seal, so as to bind his principal upon the warranty as his deed; but such a warranty, though under seal, is evidence, as an admission of the agent, at the time of the sale, of the terms of the contract.

Error to the Circuit Court of Perry. Before the Hon. G. Goldthwaite. •

DAVID CAMPBELL declared in assumpsit against the plaintiff in error, on several promissory notes. The defendants pleaded *non-assumpsit*, failure of consideration, and fraud. On the trial, it appeared, that the notes sued on, were given by the defendants, to the plaintiff, in the purchase of a negro, in 1840. The price agreed to be paid was \$900; \$500 was paid in cash, and the notes sued on were given for the residue. The negro was sold to the defendants by Alexander Campbell, the agent of the plaintiff. The bill of sale was under seal, and signed David Campbell, by Alexander Campbell, and contains a warranty of soundness. It did not appear that Alexander Campbell had authority under seal, but there was testimony tending to show, that he was authorized to sell the negro. The defendants also offered proof, tending to show, that at the time of the purchase, and before, the negro was diseased, and unsound; that the plaintiff and his agent knew of this unsoundness. That the negro was sold as sound, and so represented to the defendants, and that the defendants were ignorant of his unsoundness until a short time after the sale. That as soon as they discovered the negro to be unsound, they addressed a letter to plaintiff, and also to Alexander Campbell, offering to rescind the contract

of purchase, and testimony was also offered, tending to show, that the letter was received by the plaintiff.

On this proof the court charged, that to authorize Alexander Campbell, to bind David Campbell, by a warranty under seal, it was necessary that he, Alexander Campbell, should have had authority under seal; and without authority under seal, the warranty was not the deed and warranty of the plaintiff.

The defendants requested the court to charge the jury, that if they believed that Alexander Campbell was authorized to sell the slave, that the warranty, though not the deed of the plaintiff, might yet be considered as his written warranty. This charge the court refused to give.

The defendant also requested the court to charge, that if Alexander was the agent of David Campbell in the sale of said negro, and that he represented said slave as sound, knowing him to be unsound; that this would be a fraud, and that the said writing, purporting to be a warranty of soundness, although not the deed of David Campbell, might be regarded as evidence that Alexander Campbell represented said slave as sound, at the time of the sale. This the court also refused.

The defendants also requested the court to charge the jury, that if they believed, that said David received the price for said slave, and knew of the sale and warranty, and also received the letter of the defendants, and made no reply, and waited for near five years before he made any demand for the payment of the notes, that these facts might be considered by the jury, as a ratification of the warranty, although under seal. This charge the court also refused.

The charge given, and the refusal to charge as requested, is here assigned for error.

A. GRAHAM, for plaintiff in error.

1. The American authorities differ from the English as to the strict rule requiring an agent to have authority under seal to execute a deed. Story on Part. § 121, 122.

2. A ratification of a deed may be without seal in some cases.

3. The warranty was not *required* to be under seal, and is therefore binding as a parol contract. Story on Part. § 122, and note; 2 Kent, 614; 1 Wend. 424; 4 Ib. 285; 19 Johns. 65.

4. A principal is bound by the fraudulent representations of his agent. Story on Ag. § 126, 127, 139; 1 Greenl. Ev. 125; 13 Wend. 518.

5. A power to sell a slave, implies a power to warrant. 1 Ala. Rep. 446; 9 Por. 305.

6. The statements in the deed were not the less false representations from the fact of their being under seal. Indeed, being in writing, no verbal evidence would perhaps be heard. Hilliard on Sales, 256.

DAVIS, contra.

An agent cannot bind his principal under seal, unless his authority so to bind is under seal. Story's Ag. § 49; Skinner v. Gunn, 9 Por. 305.

The principal must ratify by seal, the acts of his agent, done for him under seal, before he is bound thereby. Story's Ag. § 242.

The writing of a third person in respect to a fact, is not good evidence, but the writer ought to be called. 1 Stark. Ev. 40, 41.

DARGAN, J.—It is true, that an agent cannot bind his principal by deed, unless he have authority under seal; but if an agent be authorized to sell a chattel, which he may do by parol, or by writing not under seal, and the agent sell the chattel, and execute a conveyance under seal, and the principal receives the purchase money, in whom is the title to the chattel vested? Suppose the principal could cancel the contract, because it is under seal, yet he does not choose to do it—I ask, if the title is not perfect in the vendee? If so, by what right does the vendee hold? The answer is, by his purchase. Why cannot the original owner claim the chattel? Because he has parted with his title. Then there is a contract consummated between the vendor and the ven-

dee. The vendor is not bound by the deed, yet it is a contract. It can only be a simple contract, or a contract by parol. The testimony tended to show, that David Campbell authorized Alexander Campbell to sell the slave. The power to sell, implies the power to warrant the title, and the soundness of the slave. See *Skinner v. Gunn*, 9 Porter, 305; *Gaines v. McKinley*, 1 Ala. Rep. 446. And the only remaining question is, was there a warranty?

This could be shown by what the agent said at the time of the sale; and we entertain no doubt but the bill of sale might be looked to by the jury, not as the deed of the plaintiff, and therefore binding on him, but as evidence, or the admissions of the agent at the time of the sale, to ascertain the terms of the contract. If the agent had written down the terms of the sale, under his own seal, this would not have bound the plaintiff, as by his deed, but it being the declarations of the agent, made at the moment of executing the contract, and showing what the contract was, it would be evidence by which the jury could be informed of the nature and terms of the contract. From this it results, that the court erred in not giving the charge first requested by the defendants.

The judgment is therefore reversed, and the cause remanded.

MCCOLLUM v. HUBBERT AND CAPLE.

1. When a party whose land has been sold under execution, delays more than four years, before he makes application to set it aside, during a large portion of which period, he has been engaged in litigating the title, with the purchaser, a much stronger case will be required to warrant the interference of the court, than if a prompt application had been made.

McCollum v. Hubbert and Caple.

2. A sheriff having executions in his hands, made a levy on land, and went out of office, without making sale of it. The execution on which the levy was made coming to the hands of his successor after his qualification, he struck the name of his predecessor out of the levies, and inserted his own, altering the date to correspond with his reception of the execution, and sold under this levy. Held, that the sale was not affected by the previous levy of his predecessor.
3. A fraud which will justify the court on motion, to set aside a sheriff's sale of land, must exist at the time of the sale. Subsequent irregularities will not have that effect, but the party will be remitted to his rights in another forum.

Error from the Circuit Court of Fayette County.

THIS was an application upon the motion of the plaintiff in error, to set aside a sale made of a tract of land, the property of the plaintiff, by one R. H. Poe, then sheriff of Fayette county, and which had been purchased, as was alledged, by defendants, Hubbert and Caple.

A rule was granted by the circuit court, directed to said defendants, requiring them to show cause why the sale should not be set aside, and the execution under which it was made, and the levy thereon quashed. Upon the trial, in the court, the parties having responded to the rule, and various affidavits having been taken, the circuit court, refusing to quash the execution or levy, or to set aside the sale, discharged the rule. To reverse his decision, the plaintiff brings the case to this court, and assigns for error, that the sale complained of was irregular, fraudulent and voidable, and should have been set aside. The facts of the case appear in the opinion.

PORTER & BRODIE, for the plaintiff in error, argued—

1. That the sale was irregular, the execution having been received by one sheriff, levied by him, and then turned over to his successor. *Bondurant, et al. v. Buford*, 1 Ala. R. 360; *Allen on Sheriff*, 78; *Watson on Sheriff*, 189.

2. That the sale was void, because the sheriff was a purchaser. *Ormond v. Faircloth*, 2 Haywood, 336; *Cameron v. Norwood*, 1 Murphy, 35; *Mills v. Goodsill*, 5 Conn. Rep.

475; 4 Cow. 717; *Forward & Creagh v. Savage*, 9 Ala. 959; 4 Deav. R. 126. That Poe, the sheriff who sold, became interested in the land before he made a deed, and the title dates from the deed. 1 Rich. Eq. R. 340. 3. The sale was fraudulent, as against public policy, and in such case, a *particeps fraudis* may avoid the deed. 4 Kent, 467; 11 Ves. 526; 13 Ib. 588. But McCollum was not in *pari delicto*. 4. Fair bidding was prevented by a conspiracy. 9 Ala. R. 943. 5. The smallness of the price paid, is a sufficient evidence of fraud. 1 Mum. R. 149; 11 Dallas, 221; *Mobile Cotton Press Co. v. Moore, et al.* 9 Por. 679; *Abercrombie, et al. v. Conner*, 10 Ala. R. 294.

E. W. PECK, contra. 1. The motion was properly denied because the necessary parties were not before the court. In order to quash the execution, the plaintiff therein must be made a party. The sheriff also should be a party to a motion to quash the levy, and set aside the sale.

2. The motion was multifarious, or rather, there was a misjoinder. A motion to quash *fi. fa.* and levy and set aside a sale, involving the interests of different parties, may not be joined.

3. The motion was properly refused on the merits. There was no evidence to impeach the transaction for fraud, and the agreement to permit the plaintiff to redeem, was entered into *after* the sale, which cannot have the effect to render it invalid.

CHILTON, J.—In *Mobile Cotton Press Co. v. Moore and McGehee*, 9 Porter's Rep. 692, this court determined, that a party injured by the improper execution of a *fieri facias*, may obtain redress on a motion to the court from which the process issued. 2. That a sale of real estate will be set aside, when the sheriff is guilty of a mistake, irregularity or fraud, to the prejudice of either party or a third person, and that the misrepresentation, or fraud of a purchaser furnishes ground for invalidating the sale.

The particular time within which the party injured may invoke the action of the court to set aside a sale, has not been very definitely settled by the previous adjudications of this

court. In the case of *Hubbert, et al. v. McCollum*, 6 Ala. Rep. 221, this court say, the motion must be made in a seasonable time—most regularly, at the first term succeeding the return of the process, but add, there may be circumstances under which the court should interfere at a subsequent term, especially, if there are sufficient reasons for not having sought its action earlier. In *Abercrombie, et al. v. Connor*, 10 Ala. Rep. 293, which was a motion to set aside a sale of lands, it is said, “upon a sale of lands under execution, a mere right of action passes to the vendee, but where personal property is sold, the possession itself is delivered. In the latter case, the application to set aside the sale must be immediate, or at least, as soon as reasonably may be, or the delay must be excused, but where lands are the subject, the motion may be made any time before the purchaser takes possession or recovers it by suit, unless the possession is acquired in so short a time after the sale, that an application cannot be conveniently made. The question recurs in the case before us, has the plaintiff in error brought himself within the influence of either of these decisions, as to the time of making his application ?

The land was sold on the 5th day of October, 1840 ; the motion to set aside the sale, was made on the 14th day of October, 1844, more than four years from the date of the sale. The plaintiff was fully advised of the intention of the purchasers to assert their claim to the land, by their instituting suit against him for its recovery on the 22d of April, 1841. Having litigated with them their right to a recovery in that action some three years and six months, at a considerable cost, as we must suppose, to the parties, he sets on foot the present motion, which, if it could be sustained, would promptly have terminated the whole controversy. We are not prepared to say, that under the influence of the former decisions of this court above referred to, when applied to the facts, as we shall presently notice them, the judgment of the circuit court should for this cause be affirmed, but we feel constrained to add, before dismissing this branch of the case, that the law does not regard such delay with indulgence, and that the inference of acquiescence on the part of the plaintiffs in any supposed irregularities or fraud in the sale, may well

be drawn, requiring stronger proof to warrant the interposition of the court.

We will next examine the case, upon its merits, as presented by the affidavits and documentary proof. It appears from the proof that the land in controversy was sold by one Poe, the sheriff of Fayette county, on the 5th October, 1840, under three several executions upon judgments rendered in the circuit court of Fayette county, one in favor of James A. McLester, assignee, &c. for the sum of \$50 82; another in favor of T. & R. Simonton, use of James A. McLester, for the sum of \$73 29, and the third in favor of James Hogan, administrator of Reuben Jones, for the sum of \$3,655 66, which last named judgment was rendered against the said plaintiff in error and Samuel Caple, one of the defendants in this cause. To this judgment was superadded the sum of \$365 05½, as damages upon its affirmance in this court, and the *fi. fa.* was issued against McCollum, the principal, Caple, his surety in the original judgment, and Newman and Joseph McCollum, the sureties on the writ of error bond. The executions upon these judgments were placed in the hands of the defendant Hubbert; the two first named, on the 21st May, 1840; the Hogan execution, on the 20th July, 1840, the judgment having been affirmed in June, 1840. Hubbert being then the sheriff of Fayette county, levied them on the land in controversy. It further appears, that on the first Monday in August, 1840, Poe was elected sheriff, and gave bond and entered upon the duties of said office, on the 10th day of August, 1840. That the lands not having been disposed of, the *fi. fas.* were placed in the hands of Poe on the 28th August, 1840, either by the clerk of the court, or by his predecessor, Hubbert, who thereupon struck out the name of Hubbert, inserting his own name in the levies, and dating them to correspond with the time of the reception by him of the *fi. fas.*

It is proper at this point to consider an objection raised by the counsel for the plaintiff in error. It is insisted, that after the executions had been levied by one sheriff, they could not be transferred by him to his successor, and the case of *Bondurant v. Buford*, 1 Ala. Rep. 360, is relied upon to sustain this position. In that case, the outgoing sheriff, with-

out having made any levy, upon an execution which he retained in his hands, after his successor was inducted into office, received from the defendant in the *fi. fa.* the amount of the execution, and was ruled for failing to pay it over on demand. The court hold, that he is not subject to this summary remedy, inasmuch as he had no authority to receive the money. They however say, had he seized the goods of the defendant under the writ, while he was in office, then by such levy he would have acquired a special property in them, and could have sold the goods after the return day of the *fi. fa.* without a *venditioni exponas*, and though he had gone out of office. And such would have been the result in this case, had the sheriff levied upon goods, but he has indorsed a levy upon lands, which he does not sell. No special property vests in him by virtue of this levy, and he has no possession of them, as in the case of a levy upon personal property. We are not called on to decide whether his right to sell lands thus levied on, exists after he has gone out of office, but we are clear in the opinion, that the subsequent levy and sale by his successor, Poe, is not affected by the indorsement of the previous levy, and that the sale cannot be avoided for this cause.

Was there fraud in the sale, is the next inquiry. We have examined the various affidavits submitted by the parties respectively, and although the case upon this point is not entirely free from circumstances of suspicion, we think there is no proof which would warrant the court in setting aside the sale. The plaintiff in error was present at the sale, consenting to it, and had made, as he himself states, an arrangement with one Atkins to purchase it in for him, at a nominal sum, and then to convey the title to his father, thus putting it beyond the reach of his creditors. This fact being communicated by Abernathy to Caple, who was the surety of the said McCollum, he, as he swears, purchased the land for his indemnity, but after the sale, agreed to permit said plaintiff to redeem by paying the amount of the execution before the return day, and refunding the money bid at the sale, which was \$510. After the purchase, Caple agreed that the deed might be made to himself and Hubbert, and by subsequent agreement, it was consented that Poe, the sheriff, should

have an interest of one third in the land, but each and all of these parties take with a knowledge of the arrangement made with McCollum, and so far as the proof discloses, were willing for the agreement to be consummated. Poe, afterwards sold out his interest to one Abernathy, and is sworn as a witness on both sides. He states, that at the time of sale, he had not the slightest interest in the purchase. That the sale was fair and *bona fide* as far as he knew, and that the arrangement by which he acquired his interest was subsequently made. Hubbert, Caple and Abernathy are all sworn, and they unequivocally deny the fraud, as well as the alledged combination to purchase in the land, but admit the subsequent arrangement by which the land was to revest in McCollum. There is some proof of declarations made by the parties, which tend to cast suspicion upon the transaction. One witness, (Powell) and the most important, states, that some considerable time after the sale, Caple, speaking of the action which he and Hubbert had brought against McCollum for the land, said to the witness, "tell him" (McCollum) "I relinquish all interest I have in the land—it was a rascally action any how." This declaration, if it could operate so as to defeat the rights of Caple, could not have this effect as to Hubbert, who was in no wise connected with it. But without protracting this opinion, it is satisfactorily shown by the proof, that the sale, *at the time* it was made, is free from fraud, and that it was then, and has been subsequently, recognized and sanctioned by the plaintiff in the motion. He has never paid the \$510 bid at the sale, and credited on the execution. However reprehensible may have been the conduct of the parties since the sale, the court cannot for this cause set it aside, but must refer the parties to another tribunal. The fraud or irregularity which shall avoid a sheriff's sale upon motion, must exist at the time of the sale: the circuit court could not properly adjust the equities of the parties occurring subsequently. Upon a view of the whole case, we are satisfied the court did right in overruling the motion, and its judgment is affirmed.

MOORE v. JONES.

1. The time within which an appeal may be taken from a judgment of a justice of the peace, does not begin to run until the judgment has received the final action and approbation of the justice, whether he grants a new trial, entertains a motion for that purpose, or improperly sets his judgment aside, and afterwards reinstates it.
2. When a garnishee answered, that he would be indebted to the defendant in attachment, or to another person, who is named, in a certain sum, at a future time, the court may cause citation to be issued to such person, to contest with the plaintiff the right to the money.
3. When the plaintiff controverts the answer of the garnishee, or the right of a transferee to the debt, an issue will be sufficient, if it re-asserts, that the garnishee is indebted, or conceding the answer to be true, denies that the assignee has any adverse rights.
4. It is not competent to prove by reputation, that a party who had been in possession of land, occupied it as a tenant, and had no title.
5. A witness, (the wife of the defendant in attachment,) was asked, "did you not, after the lot was rented to Wm. Byrne, for the year 1845, and before the rent was due, promise to pay debts to W. & H., B. & T., and M. A. and J. H. W., in a conversation between Wm. Houston and yourself, in the parlor of the Marion Hotel, or in the Marion Hotel, out of the rent due by said Byrne, for said lot, in 1845;" and she having answered in the negative—Held, that the plaintiff might prove by Houston, that she did make such statements, for the purpose of discrediting her, she having been called by the opposite party, to prove his right to the rent of the land.
6. The mere fact, that a bond for title to real estate is made to a married woman, does not establisb that it is her separate estate, at least in a court of law; and if the property be occupied by tenants, the husband may sue for the rent, or the tenant may be garnished by the husband's creditors. If the wife has any equitable rights, she may assert them in a court of equity.
7. The court cannot determine upon the credibility of a witness. Though contradicted as to part of his testimony by other witnesses, the jury may believe the residue: but if satisfied that he testified corruptly false, should reject his entire testimony.

Writ of Error to the Circuit Court of Perry. Before the Hon. G. D. Shortridge.

ON the 13th August, 1845, defendant in error made an affidavit that she had recovered a judgment before a justice of the peace of Perry, against Charles Chidsey, and that the money thereon due, could not be made of him; thereupon a garnishment was issued by the justice to C. G. Byrne, a supposed debtor of Chidsey. The garnishee answered on the 26th day of August, that he would be indebted to the plaintiff in error, or Chidsey, on the 1st January 1846, in the sum of \$150, subject to a deduction of \$50, for the rent of a house for 1845. On the same day a notice was issued by the justice, to the plaintiff in error, to come in and maintain his right to the sum admitted by the garnishee; this notice was returnable on the 9th September, 1845. A case was made between the parties now before this court, which was continued by the justice from time to time, until the 9th of October, 1845, when a judgment was rendered in favor of the defendant in error for costs. On the 10th of October, a motion was made before the justice for a new trial which was granted, and the cause set for hearing the next day, when the motion for a new trial was set aside; and on the succeeding day, an appeal prayed and granted, but no bond was executed until the 16th of October.

On the 22d October, a notice was issued to, and executed on the defendant in error, informing him that an appeal had been granted, returnable to the fall term of the circuit court, holden in 1845. On the 30th March, 1846, a notice was issued by the clerk of that court, to the plaintiff in error, requiring him to come in and contest with the defendant, the validity of the transfer of the indebtedness admitted by the garnishee. At the succeeding fall term, the plaintiff in error was made a party on his own motion; and thereupon moved to dismiss the appeal, on the ground that the bond was not executed within the time prescribed by law. This motion was overruled by the court.

The defendant then moved to quash the motion which had been served on him; this motion was also overruled. Thereupon the plaintiff tendered an issue, to which the defendant demurred, and his demurrer being overruled, he joined in the issue; which was submitted to a jury,

who returned a verdict for plaintiff, on which a judgment was rendered against the defendant for costs, and a *procedendo* directed to issue to the justice.

Pending the trial, the defendant below excepted to the ruling of the presiding judge. The bill of exceptions presents the following points: 1. The plaintiff having examined the garnishee, Byrne, in respect to the contract for the rent of the premises referred to in his answer, for the year 1845, introduced another witness, of whom he inquired if it was not notorious in the community that Robert E. Love, who occupied the same in the year 1844, was a tenant, and not the owner. Plaintiff also proved by another witness, that Love admitted that such was the fact. To the admission of this evidence the defendant objected, but his objection was overruled, and the witness answered, that it was common reputation in the community, that Love's possession was as a tenant, and this answer was allowed to go to the jury in despite of an objection by the defendant.

2. The defendant introduced the deposition of the wife of Charles Chidsey, who testified that she had transferred to the defendant, with the consent of her husband, a bond executed in her favor by Lea and Towns, conditioned to make titles to the premises occupied by Byrne: *Further*, this transfer was made for a valuable consideration. This witness also stated that the defendant was placed in the possession of the premises before the same were occupied or rented by Byrne. Among the questions proposed to her was one as follows:—"Did you not, after the lot was rented to Mr. Byrne, for the year 1845, and before the rent was due, promise to pay debts to Wyatt & Houston, and Brown & Foulkes, and M. A. & J. H. Myatt, in a conversation between Wm. Houston and yourself, in the parlor of the Marion Hotel, or in the Marion Hotel, out of the rent due by Byrne for said lot for 1845." This question being answered in the negative, the plaintiff offered to prove by Wm. Houston, that Mrs. Chidsey, in the conversation alluded to in the foregoing interrogatory, did make the promise therein referred to. The defendant objected to the introduction of such testimony, because there was not a sufficient predicate laid by the interrogatory to Mrs. Chidsey; but the examination was permitted by the

court, and the witness stated that Mrs. Chidsey did make to him the promise which the interrogatory to her supposed.

W. R. Brown was then offered by the plaintiff, to prove a contract between the witness and Mrs. Chidsey, in respect to the application of a part of the money to be paid by Byrne for the rent of the premises referred to. Witness testified that such a contract was made in the presence of the defendant, and, as he understood, received defendant's assent. This testimony was objected to by the defendant, but received by the court.

The court charged the jury: 1. That the bond of Lea & Towns to make titles to Mrs. Chidsey, inured to her husband, with all the rights it conferred. 2. If they believed that Mrs. Chidsey testified falsely in one particular, her testimony was to be regarded as untrue in every particular.

Thereupon the defendant prayed the court to charge the jury: 1. That if Mrs. Chidsey was contradicted by only one witness, her testimony was entitled to as much credit as the contradicting witness—that the jury had as much right to believe Mrs. Chidsey as Mr. Houston. This charge was refused—the court saying that where the witness had an opportunity to be on her guard as in this case, and was contradicted, the weight of testimony was with the contradicting witness, and the common rule of one against another, did not apply. To the several rulings of the circuit court shown by the bill of exceptions, the defendant excepted, &c.

I. W. GARROTT, for the plaintiff in error, made the following points: 1. The appeal should have been dismissed, because the bond was not executed in due season. Clay's Dig. 314, § 9; 1 Stew. Rep. 407; 3 Stewt. & P. Rep. 331; 2 Port. Rep. 342. 2. Defendant below did not claim under a transfer or assignment from Chidsey, and could not have been required to come in and contest with the plaintiff his right to the debt, admitted by Byrne. The notice to him should therefore have been dismissed. Clay's Dig. 63, § 39, 40. 3. The demurrer should have been sustained to the issue tendered; because it does not state the date, amount or time of maturity of the debt sought to be condemned. 8 Ala. Rep. 811. 4. The evidence of reputation, in respect to

the occupancy of the premises in 1844, was inadmissible; and besides, it was irrelevant. 1 Phil. Ev. 249; 1 Stark. Ev. 60. 5. The interrogatory to Mrs. Chidsey did not lay a sufficient predicate for the introduction of a witness to contradict her. 1 Greenl. Ev. 514, 515, note 1; 1 Phil. Ev. 294. A witness cannot be contradicted to a collateral matter. 1 Phil. Ev. 272-3; 2 Id. C. & H's Notes, 726 to 729; 1 Stark. Ev. 134, 145-6. Besides, defendant could not be affected by declarations made by Mrs. Chidsey, when he was not present, nor would such declarations avail any thing if made after the assignment of the debt when he was present. 6. The bond for titles being made to Mrs. Chidsey, she, and not her husband would be entitled to the rent, and it cannot be subjected to his debts. Clancy on H. & W. 5 and 6; 2 M. & S. Rep. 393; 16 Mass. Rep. 480; 8 Ala. R. 907. 7. The court should not have assumed as a conclusion, that Mrs. Chidsey's testimony was false *in toto*, because she was contradicted in one point, but should have submitted it to the jury to pass upon the credibility of the witnesses. 1 Phil. Ev. 293; 1 Greenl. Ev. 293 to 295. 8. The record does not show that a judgment was rendered against C. Chidsey, and in the absence of such judgment there could be no proceeding by garnishment. 5 Ala. Rep. 648.

H. DAVIS, for the defendant. The bond for an appeal was executed in due season; but if it was not, the motion to dismiss came too late. 1 Stewt. Rep. 61, 457; 3 Stewt. & P. Rep. 331. Until the motion for a new trial was denied, the judgment was incomplete, and within five days after that time, the appeal was taken. The record shows that the appeal was granted immediately the judgment was perfected, and the statute being directory merely, a bond might be executed at any subsequent time.

Mrs. Chidsey being the wife of the defendant in the judgment, whose supposed debtor was garnisheed, was an incompetent witness within the act of 1845, "for the relief of mortgagees and for other purposes," which disqualifies the defendant in execution from giving testimony on the trial of the right of property. This being so, all the charges which relate to her testimony are immaterial.

The charge in reference to the effect of the title bond to Mrs. Chidsey, whether correct or not, as a universal proposition, is certainly unobjectionable as applied to the testimony. 8 Ala. Rep. 650. A sufficient predicate was laid for discrediting the witness, and the plaintiff in error should have supported her. But in the absence of such assistant proof, the circuit judge laid down the law correctly in his charge to the jury, as to the weight which her testimony was entitled. 1 Stark. Ev. 145, 521; 3 Id. 1753, 1758; 1 Phil. Ev. 291, 293; 2 Id. C. & H's Notes, 771; 1 Dev. R. 508; 7 Wheat. R. 283, 338-9.

The plaintiff in error did not prove a consideration for the transfer of the debt due Chidsey by Byrne, and he is not therefore prejudiced by the refusal to give the charges prayed. 4 Ala. Rep. 258. The first charge is the assertion of a mere abstract conclusion, for which the judgment will not be reversed, even if it laid down the law incorrectly; but it is insisted that it is unobjectionable in itself.

COLLIER, C. J.—1. It is provided by statute, that “any person aggrieved by the judgment of any justice of the peace may, within five days thereafter, appeal to the next circuit or county court, sitting for his county, first giving to such justice bond with good security, in double the amount of such judgment, conditioned to prosecute such appeal with effect; and in case he be cast therein, to pay and satisfy the condemnation of the court.” Clay’s Dig. 314, § 9. This enactment is perfectly plain and intelligible in its requirements, both as to the time within which the appeal may be prayed for and a bond executed; yet we apprehend that the time will not begin to be computed, until the judgment has received the final action and approbation of the justice. Whether he is authorized to grant a new trial or not, if he entertains a motion for that purpose, or improperly sets his judgment aside, and afterwards reinstates it, in either case it is competent to execute a bond for an appeal within the time prescribed by the statute, after the final determination of the justice is made known. For then, and not sooner, does the officer rendering the judgment consider it final. Upon this hypothesis the bond was executed in due season,

by excluding and including a day—which is the acknowledged mode of computation in such cases.

2. The act of 1840 enacts that when a garnishee shall answer that he has received notice of the transfer of the debt or property in respect to which the garnishment issued, the court shall not render judgment against the garnishee on the ground of the invalidity of such transfer; but shall suspend proceedings against the garnishee, and a notice shall issue to the party to whom the transfer is alledged to have been made, calling upon him to contest its validity with the plaintiff; and if the question shall be determined against the party claiming the debt or property alledged to be transferred, then the court shall render final judgment against the garnishee. The right of appeal, &c. is reserved to the garnishee and all parties contesting the question. Clay's Dig. 63, § 39, 40. These provisions, like every other portion of the attachment law, are remedial and beneficial, and must receive a construction which would promote rather than restrict their operation; and which would expedite and cheapen litigation. Within their spirit and meaning, one may be said to be the transferee of a debt, whom the garnishee answers, claims it as his own, and he is unable to determine whether such person or the plaintiff debtor is entitled to receive it. Within this principle the plaintiff in error very clearly comes, and it follows that he was properly brought in as a party litigant.

3. The case cited from 8 Ala. Rep. 811, is one in which the defendant in the judgment controverted the truth of the garnishee's answer. In such case, it was said that the defendant should not only make an oath that he believed the answer to be incorrect, but as the mode and manner of the garnishee's indebtedness must be known to him, the suggestion should be as ample as a declaration in ordinary cases, and an issue formed by a denial by the garnishee of the allegations against him. But this stringent rule cannot be applied where the plaintiff controverts the answer of the garnishee, or the right of a transferee to the debt admitted. The plaintiff cannot be supposed to possess such exact information in respect to the indebtedness, and it will be quite enough for him to re-assert that the garnishee is indebted, &c. or conceding the answer to be true, denying that the as-

signee has any adverse rights. In this view of the question, the issue was properly framed.

4. It is not allowable to prove by reputation, that a party who had been in possession of land, occupied it as a tenant and had no title. These are facts susceptible of proof by evidence more satisfactory and definite.

5. The question proposed to Mrs. Chidsey on cross-examination was sufficiently specific to lay a predicate for the examination of other witnesses, if she answered in the negative. It referred to a conversation held by her with a person named, at a place designated, in a certain year. 1 Ala. Rep. N. S. 65. The question cannot with propriety be said to be the introduction of a collateral inquiry, nor is it objectionable upon the ground that one person cannot be affected by the declaration, of another made when the former was not present. Mrs. Chidsey, as we understand it was called to establish, among other things, the right of the plaintiff in error to the rent of certain real estate for the year 1845; and the questions proposed to her, and the discrediting witnesses, were intended to destroy the effect of her testimony, by proof that she had promised to pay debts from the rent falling due that year. We do not suppose it was intended to make her declarations evidence beyond the point indicated, and thus far they were clearly admissible.

6. It cannot be assumed, from the mere fact that a bond for titles to real estate is made to a married woman, that it is therefore her separate estate, to the exclusion of her husband. At least such an assumption cannot be indulged at law. If therefore property thus situated is occupied by tenants, the husband may sue for and recover the rent, and the tenants may be summoned as garnishees by the husband's creditors. If the wife have equitable rights, she may assert them in a court of equity.

7. It is said if the jury should ascertain that a witness is incorrect in his testimony as to one or more facts, yet if he is not corruptly so, but is merely mistaken in judgment, or by reason of a failure of memory, the witness is not discredited further than would arise from a want of reliance on the correctness of his conception, or from a distrust in his powers of memory: and if the jury think proper, they may believe him

as to other parts of his testimony. But when once they are *satisfied of the witness's corruption*, they ought to disregard all that he has deposed to. 1 Dev. Rep. 508; 7 Wheat. Rep. 338, *et seq.* Upon this point the circuit judge took upon himself to apply the maxim *falsus in uno falsus in omnibus*, to Mrs. Chidsey's testimony, instead of laying down the law as we have indicated would be proper, and referring the question of the witness's credibility to the jury. In this he committed a fatal error.

8. An issue having been made up in the circuit court and submitted to a jury, who returned a verdict, it is too late to object here for the first time, that the judgment of the justice on which the garnishment is founded, or a substitute for it, is not shown by the record. If the objection had been made in the court below, the judgment would most probably have been supplied.

The error in the seventh point noticed, exists independently of the question of Mrs. Chidsey's competency. It is not allowable now to object that she is incompetent; if the objection had been made in the circuit court, perhaps other testimony, unexceptionable in point of law, might have been adduced. We have only to add, that the judgment is reversed, and cause remanded.

BRANCH BANK AT MONTGOMERY v. CURRY.

1. The levy of an execution on personal property, and the taking a forthcoming bond by the sheriff, does not affect the *lien* of the judgment, on the land of the defendants, though the bond be forfeited. Nor is the *lien* of the judgment affected, by the omission of the sheriff to return the forthcoming bond forfeited, or by his failure to return the execution.
2. An innocent purchaser of land, affected by a judgment *lien*, has an equitable right, to be paid for improvements made upon the land.

Writ of Error to the Court of Chancery for the 40th District, Northern Division. Before the Hon. W. W. Mason, Chancellor.

WILLIAM CURRY, the defendant in error, filed his bill in the court of chancery, against the Branch of the Bank of the State of Alabama at Montgomery, alledging, that on the 16th of August, 1837, he purchased of Gideon Riddle, a tract of land, being section nine, township eighteen, range six, east, in the Coosa land district, except five acres, which had been previously sold by Riddle, and which complainant afterwards purchased. That he paid Riddle \$13,500, one half in cash, six tenths of the residue in January, 1838, and the balance in 1839. That Riddle executed to him a deed in fee, on the day of the purchase. That complainant took possession of the land, and has made improvement thereon, of the value of ten or twelve thousand dollars. That at the time of his purchase, he had no notice of any *lien* on said land. That on the 27th of June, 1845, an execution issued from the circuit court of Montgomery county, purporting to be issued, on a judgment rendered about the 6th day of March, 1837, in favor of the Branch Bank at Montgomery, against Zimri Madden, Gideon Riddle, and James K. Abercrombie, for the sum of \$818, besides costs. That said execution has been levied on the land above described, as the property of Gideon Riddle. That complainant never had notice of said judgment, until after the said *fi. fa.* was placed in the hands of the sheriff. The bill further alledges, that an execution issued on this judgment in the year 1837, and was placed in the hands of William Blythe, sheriff, and was levied on the property of one, or more of the defendants in said execution, of sufficient value to satisfy said judgment. The bill charges, that the said execution never has been returned, and also that at the time of its rendition, and for several years after, the defendants resided in Talladega county, and were possessed of property more than sufficient to pay and satisfy said judgment. But that Madden died in 1840 insolvent; that Riddle is now insolvent, and Abercrombie has removed with his property to Mississippi. The bill also alledges, that an *alias*

execution issued on said judgment in the year 1843, which has never been returned. That the bank has used no other means to coerce the collection of said debt, and that the money could have been made out of the property of either of the defendants to said judgments, during the years 1837, 1838, or 1839, or if the levy had been made on the land in either of those years, that complainant could then have saved himself from loss. That the bank has been negligent of her rights, or has been paid, or made some valid agreement to postpone the payment of said debt; and that if the land be now charged with the debt, it will be a loss to the complainant. The bill contains a prayer, that the bank be enjoined from proceeding to sell said land under said execution; and Riddle, Abercrombie, the administrator of Madden, and the bank, are made defendants to the bill; and that they discover if said judgment has been paid; or if there has been any agreement to postpone the collection, and what proceedings have been taken under the *fi. fa.* and levy, made in 1837, on the property of Madden.

The bank answered the bill; admitted the rendition of the judgment; that an execution issued thereon in 1837, which has never been returned; also the issuance of a *fi. fa.* in 1843, which was placed in the hands of N. E. Benson, a director; the issuance of the *fi. fa.* in 1845; and that they were proceeding to collect the money, by sale of the lands. Denied that the judgment was paid, or that any agreement had been entered into, with any of the parties, to postpone the collection of the debt; and denied all knowledge of the complainant's purchase, or of the condition of the defendants in the execution; or of the levy stated to have been made on the property of Madden. Riddle also answered the bill, and admits the purchase as stated in the bill, and that a levy was made on the goods of Madden in 1837. The bill was taken as confessed as to the defendants, Abercrombie and Blythe.

Many witnesses were examined. It was proved the complainant purchased the land as alledged, of Riddle, and has made valuable improvements on it. The money could have been made out of the defendants in execution, during the years, 1837, 1838, and probably in 1839. The sheriff, Blythe,

levied the *fi. fa.* on the goods of Madden in 1837, and took a forthcoming bond for their delivery; the goods were returned to Madden, but were not delivered to the sheriff on the day appointed for sale; there has been no return of the bond, or the execution. Abercrombie has removed from the State, and carried considerable property with him: this was in 1840; Madden died insolvent in 1841, and Riddle is now insolvent. There is no evidence, that the bank had any knowledge of the purchase made by the complainant, or of the condition of the parties to the judgment, or that there was any agreement to postpone the collection of the debt. The chancellor rendered a final decree, perpetually enjoining the bank from selling the land.

L. E. PARSONS, for the plaintiff in error.

S. F. RICE, contra.

DARGAN, J.—Whether there is error in the decree of the chancellor, or not, depends on the question, whether the bank has lost the *lien* created by the judgment, on the land described in the bill.

In the case of *Campbell v. Spence*, 4 Ala. Rep. 543, this court held, that if an execution be levied on the personal property of the defendant, and a forthcoming bond is taken by the sheriff, the *lien* of the judgment, on the real estate of the defendant, is not thereby lost; and after the forfeiture of the bond, the plaintiff may sue out a new execution on the judgment, if he elect to do so; and that the *lien* of the elder judgment, would not be postponed, in favor of a junior judgment, on the land of the defendant.

And in 8 Ala. Rep. 759, it is said, that if goods are levied on, and a forthcoming bond is taken, which is forfeited; or if they be removed by the defendant, the plaintiff may have a new execution on the judgment. The same principle is recognized in the case of *Bumpass v. Welch*, 9 Porter, 201. In the case of *Hopkins v. Land*, 4 Ala. Rep. 427, an execution had been issued on a judgment against three, and levied on the property of one of the defendants, and a forthcoming bond taken, which had been returned forfeited—an *alias* execution was issued on the judgment, and the land of another

defendant, who had not joined in the bond, was sold. Ejectment was brought by the purchaser at sheriff sale, and the defendant insisted, that the judgment was satisfied by reason of the previous levy, and the forfeiture of the forthcoming bond. But the court held, that there was no satisfaction of the judgment, and in the opinion, Judge Goldthwaite says, "it has never been pretended, that the rights of the plaintiff are affected by taking a forthcoming bond, if its condition has been complied with, and we cannot perceive why a non-compliance with the condition, should impose on the plaintiff the necessity of resorting to a new remedy."

It is true that he expressly waived the consideration of the question, whether the *lien* was affected by the bond, and the return of forfeiture; yet it is evident, that if the plaintiff had a right to an execution on his judgment, notwithstanding the bond, the *lien* of the judgment was not lost. And in the case of Campbell v. Spence, which was decided at the next succeeding term, the question arose, how far the *lien* was affected, or whether the levy, and taking the bond, would postpone the *lien*, in favor of a *junior* judgment; and it was held, that the *lien* continued on the land of the defendant, and that a junior judgment creditor, could not claim priority in the distribution of the proceeds of the land, by reason of this levy, and taking the bond for the forthcoming of personal property.

These authorities are conclusive to show, that the levy of an execution on personal property, and the taking of a forthcoming bond, by the sheriff, although the bond be forfeited, does not affect the *lien* of the judgment, on the land of the defendants. It is true that a different rule prevails in several other States, but after the best reflection we have been able to bestow upon the subject, we would not adopt a different rule under our statutes, if the question was *res integra*—for it is made the duty of the sheriff, to take a forthcoming bond from the defendant, with good security, and to let the property remain with him; this is for his convenience and benefit. If there are several defendants, and the levy is made on the property of one, he has the right to replevy by giving bond, although his co-defendants do not join in it. 4 Ala. Rep. 427. And it would seem inconsistent with the general

principles of law, that one defendant, without actual payment, could discharge a co-defendant without the concurrence of the plaintiff, by giving a new security. If we hold that the *lien* of the judgment is lost by a levy, and the giving of a forthcoming bond, it must be on the ground alone, of the satisfaction of the judgment; and if we say the judgment is satisfied, by the forthcoming bond being forfeited, then a co-defendant may be discharged, after execution, by the lawful act of the sheriff and one of the defendants, without even the knowledge or consent of the plaintiff.

Other apparent hardships could be suggested, that would follow, from holding that the levy on personal property, and the taking a bond, would discharge the *lien*. Suppose a levy was made on a slave of one defendant, and a forthcoming bond given: on the day of sale he is delivered, but from disease intervening between the levy and the sale, he brings little or nothing. The bond however is complied with, and if the bond discharges the *lien*, the land of the co-defendant, *aliened* in the interim between the levy and sale, is discharged from the *debt*. And thus it may be lost, not by any *laches* of the plaintiff, but simply because the sheriff has done, what he is bound to do; and the defendant has exercised his legal right, given by statute. The rule adopted by this court, holding that a levy, and the taking of a forthcoming bond, does not discharge the *lien* of the judgment, we think appropriate, and correct under our statutes, and the settled practice that has grown up under them.

2. The *lien* of the judgment is not affected, because the sheriff has failed to return the bond forfeited, and also failed to return the execution, and we are not under the evidence, authorized to presume it has been paid. By statute, the plaintiff may sue out another execution, although the first is not returned. Clay's Dig. 201; 4 Ala. Rep. 427. And although his failure to discharge his duty, has subjected him to an action, this failure of the sheriff does not impair the rights of the plaintiff, against the defendants in the judgment. See 4 Ala. Rep. 543; 9 Porter, 201. The complainant, it is true, has paid a full price for the land, and purchased in good faith; but on the day of his purchase, the land was charged by law with the payment of this debt. Has the plaintiff in

error done any act, that will amount to a forfeiture of the *lien*? The bank has remained passive merely; it does not appear it had notice of the purchase by the complainant, and probably did not know of their rights against the land. Under these circumstances, we cannot pronounce that the *lien* of the bank is lost, even in favor of an honest purchaser, without violating the well settled principles of law.

The amount of the debt is so small, compared to the value of the land, that we have not thought it necessary to notice the question, that might arise out of the improvements made upon it, by the complainant; but from greater caution, we will not preclude the complainant from asserting such equity as he may have, arising from the improvements put upon the land by him. We shall therefore reverse the decree of the chancellor, and will here render the decree he should have rendered, dismissing the bill of the complainant, without prejudice, however, to his equity arising from the improvements made upon the land by him.

If the complainant should decline to discharge the debt, and prefer to have the land sold, he may assert this equity as he may be advised. It is further ordered that the complainant pay the costs of this court, and the costs of the court below.

HILL v. WARD.

1. In an action for slandering the title of another's property, the slanderous words must be set out in the declaration. Where the injury was alledged to consist, in asserting title to a slave, sold under execution as the property of the plaintiff, it was necessary to alledge what the defendant said, what title he set up, and that the words were spoken in the hearing of the bidders.
2. The defendant in such an action, to rebut the presumption of malice, may prove, that upon a fair representation of his claim, he was advised by

a lawyer to forbid the sale of the slave, to render his claim under a mortgage of the slave effectual.

3. Although the title which the defendant asserted was invalid, if asserted in good faith, without malice, no recovery can be had against him.

Error from County Court of Perry.

ACTION on the case by Hill against Ward, for slandering the title of the plaintiff to a certain slave, sold by the sheriff of Perry county, at a public sale under executions against plaintiff, at a great sacrifice, as it is alledged, in consequence of defendant's wanton, false and malicious forbidding the sale, and assertion of a pretended title. Plea, not guilty—verdict and judgment for defendant. The facts more fully appear in the opinion.

GARROTT, for plaintiff in error.

A. B. MOORE, contra.

CHILTON, J.—As the demurrer to the two first counts in the declaration was sustained, it becomes necessary to examine them as to their legal sufficiency. In the first count, it is averred, that on the third day of March, 1845, the plaintiff offered for sale at Marion, Perry county, to the highest bidder, a negro slave named Lindy, the property of the plaintiff, when and where, and without probable cause therefor, but wantonly and maliciously contriving and intending to injure the plaintiff, by interrupting the fair and open sale of said slave, the said defendant did publicly forbid the sale of the said negro slave, under a pretended title to the same, whereby the real value of the slave was greatly depreciated, persons being deterred from bidding by the unjustifiable interference of the said defendant, and the said negro woman in consequence thereof, was bid off at a price greatly below the real value thereof, and below that which the plaintiff could otherwise have obtained for her, had the defendant not thus maliciously forbidden the sale, to the damage of the plaintiff five hundred dollars. The second count avers, "that on the day aforesaid, the sheriff of Perry county, by virtue of exe-

cutions against the plaintiff, in favor of one William D. Stewart, as well as others, levied on said slave, and publicly exposed her to sale at auction, to the highest bidder, for cash, as the property of the said plaintiff, to satisfy said *fi. fa's*, when and where the defendant, without probable, or justifiable cause, but wantonly, &c. publicly forbid the sale of said negro slave, under a pretended claim of title to the same, whereby, persons being deterred from bidding, she was knocked off at a price greatly below her real value, and below what she would otherwise have brought, but for such interference, to plaintiff's damage," &c.

A declaration must alledge all the circumstances essential in law to the support of the action, and these circumstances must be stated with such precision, certainty and clearness, that the defendant may know what he is called upon to answer, and be able to plead a direct and unequivocal plea. In actions for slander, both as it respects the reputation of a party, or his title to property, the slanderous words should be set out in the declaration. 1 Chit. Pl. 404; Yundt v. Yundt, 12 Sergt. & R. 427. The pleader in this case, aware of the rule, has framed the other counts of his declaration in strict conformity to the law. We are clearly of opinion, the two counts above mentioned are bad on general demurrer. See forms, 8 Wentworth's Pl. 299; 2 Chitty's Pl. 641. It is not averred in these counts what the defendant said—nor what title he set up; nor is it stated that the words were spoken in the presence or hearing of the bidders. Conceding that a party is liable for any false and malicious words spoken to the prejudice of another, if special damage ensue, the allegations contained in these counts, in our opinion, do not bring them within this rule. See 4 Ala. R. 18; Starkie on Slander, 204-5.

There was no error in permitting the defendant, in order to rebut any presumption of malice, to show that he was advised by an attorney at law, to forbid the sale of the slave. The facts show, the slave was sold under execution against the plaintiff, and was seized by the sheriff, while in defendant's possession, by virtue of a mortgage made by the plaintiff to the defendant. On the morning before the sale, the defendant obtained the advice of counsel as to the course for

him to pursue, and was instructed to forbid the selling of the slave, so as to render his mortgage deed effectual. The admissibility of such testimony, with the qualifications under which it is to be received, is laid down in the case of *Chandler v. McPherson*, 11 Ala. Rep. 916, and cases there cited. It was held, and we think correctly, that malice must be shown, or implied from the circumstances, in order to entitle the plaintiff in such actions to recover. *Starkie on Sl.* 205. The circumstances of the defendant's title and interest, may rebut the implication of malice, and the fact that he was advised by counsel, learned in the law, upon a fair representation of his claim, that it was necessary for his protection to forbid the sale, is proper for the jury, in determining whether the interference of the defendant was wanton, or was called for by a desire to protect what he was advised was his rights. *Star. Sl.* 203.

It follows from what we have said, that there was no error in the charge of the court "that unless they should believe that the defendant was actuated by malice in forbidding the sale, and that the words used by him in regard to his claim to said slave were false, they must find for the defendant. It is sufficient if the defendant have a *bona fide* claim, or color of title, which he asserts in good faith. His title need not be paramount to that which the plaintiff claims; for if an action should lie, when the defendant claims *bona fide* an interest, how can any one make claim or title, or begin any suit, or seek advice and counsel, without subjecting himself to an action.

The question of malice was properly referred to the jury by the court, and they, by their verdict, have found the defendant asserted his claim in good faith, and as we are satisfied that malice is a necessary ingredient to entitle the plaintiff to recover, the court did not err in refusing the charges asked, which assume that a recovery may be had by reason of the invalidity of the defendant's title, in the absence of malice.

Let the judgment be affirmed.

CASKY, ET AL. V. HAVILAND, RISLEY & Co.

1. It is not necessary, in a notice to a sheriff, that a motion will be made against him for a neglect of duty, to alledge that his official character continued, up to the time when a *feri facias* placed in his hands was returnable.
2. The forms of returns to be made to process, as prescribed by statute, are not exclusive of all others, expressing the same meaning. A return of a sheriff to an execution, which states a levy and sale of certain lands, and the appropriation of the proceeds to older executions, but which does not affirm, that the defendant had no other property from which the residue of the execution can be satisfied, is substantially defective.
3. The refusal of a court, pending a motion against the sheriff, to permit him to amend his return, cannot be assigned as error in the judgment upon the motion. If the party is prejudiced by the refusal, the remedy is by mandamus.
4. A judgment will not be reversed because a charge, legal in itself, may not be sufficiently full, or is calculated to mislead the jury; but additional or explanatory charges should be moved for.
5. It is not the duty of the sheriff to return the execution to any one but the clerk, or his deputies; but must use all reasonable diligence, to make a due return to the clerk.
6. When the declarations of a sheriff constitute a part of his acts, they are admissible as part of the *res gestae* against his sureties.
7. It is not necessary in a motion against the sheriff and his sureties, for neglect of duty of the former, that the jury should be satisfied beyond a reasonable doubt, that the plaintiff's case, or the defence has been made out. All that is necessary, is, that there should be such a preponderance of proof as will convince the judgment, by the application of the ordinary tests of truth.

Writ of Error to the County Court of Randolph.

IN the transcript, there is a notice addressed to Robert Casky, late sheriff of Randolph, informing him that during the term of the county court of Randolph county to be holden on the fourth Monday of July, 1846, the defendants in error would move for judgment under the act of 1819, against him and the sureties in his official bond, as sheriff of Ran-

dolph, for the amount of a *feri facias* issued from that court in favor of the plaintiff in the motion against John Gooden and Lawson B. McKee, for the sum of \$305 81 damages, and the sum of \$13 43 $\frac{1}{4}$ costs; which *fi. fa.* is tested of the 11th March, 1845, and was placed in the hands of Casky on the 25th of the same month—he being then sheriff, to be executed and returned according to law. The notice is dated the 8th of July, 1846, and alledges that the *fi. fa.* therein described was returnable to the county court of Randolph, on the fourth Monday of July, 1845, and that Casky had failed to return the same according to law.

At the term of the court when the notice indicated that the motion would be made, the parties appeared, and the defendant moved the court to quash the notice for defects apparent on its face, which motion was overruled.

In the transcript, it is stated that the defendant, Casky, demurred to the notice, and the plaintiffs joined therein; the judgment entry takes no notice of the action of the court thereon, but the bill of exceptions states that the demurrer was overruled. Issue was taken upon the notice and submitted to a jury, who returned a verdict for the plaintiff, and judgment was thereon rendered against the sheriff, and the persons who were shown to be his sureties.

From a bill of exceptions, sealed at the instance of the defendants, it appears that the plaintiffs offered in evidence the *feri facias* described in their notice, and proved that the defendant, Casky, was sheriff of Randolph when it was placed in his hands, and also when it was returnable. This defendant however objected to evidence of the fact that he was sheriff after the reception of the execution, on the ground that there was no averment in the notice to authorize it, but the objection was overruled, and the defendant excepted.

Plaintiffs then offered to prove the declarations of Casky, made in the absence of his sureties; to the admission of this evidence the defendants objected, but their objection was overruled, and proof of the declarations admitted.

The defence relied on was, that the deputy in whose hands the execution was placed, went to the office of the clerk for the purpose of returning the same, either a few days before it was returnable, or on the day of its return;

that the clerk was absent, the office closed, and neither himself or deputy could be found. Thereupon a witness was offered, who stated, that in the summer of 1845, and a few days before the sitting of the court, according to witnesses best recollection, (but he could not state the precise time,) he saw the deputy referred to, at the court house, who inquired of him where the clerk was, or any person who was doing business for him, and the deputy also informed witness that he wished to return to the office of the clerk some papers then in his hands, but could not find any person to receive them. Witness could not identify the execution in question, or state whether it was mentioned by the deputy. To rebut this testimony, the plaintiffs proved by the clerk, that on Wednesday, Thursday and Friday before the court was holden, that he (the clerk) was in town, and the most of the time in his office. It was also shown, that the clerk was absent from home, from some time in May up to the Tuesday night before the court was holden, and that he had no sworn deputy; but in his absence one W. H. Cunningham was in the habit of doing business for him. During the absence of the clerk, Cunningham was occasionally absent; when this occurred, the key of the office was left with J. Benton, or A. J. Hamilton—and at such times they occasionally attended to the business of the office. But there was no proof that either of these persons were known to the deputy as such representative of the clerk.

The defendant's counsel prayed the court to charge the jury as follows: 1. That they must be satisfied beyond a reasonable doubt, that the defendant failed to return the *fiery fucias* in question, and that he had no reasonable excuse for such failure, or else they must find for the defendant. This charge was refused, and the jury were instructed, that it devolved upon the plaintiffs to satisfy them beyond a reasonable doubt of the failure to return, and that the defendant was sheriff; that if this was shown, it then devolved upon the defendant to show that he had a reasonable excuse; and that the question of a reasonable doubt did not arise on the excuse, although the statute under which the recovery was sought was highly penal.

2. That if they believed that the failure to return did not

occur in consequence of neglect or other improper motive on the part of the officer holding the execution, but was from information that the clerk was absent, whether correct or not, they should find for the defendant. Which charge was also refused.

3. That unless it was averred in the notice that the defendant was sheriff, on the return day of the execution, they could not find for the plaintiffs. This charge was in like manner refused.

Plaintiffs then read to the jury the forms of returns on executions, from Clay's Dig. pages 200 and 201, and prayed the court to charge the jury, that unless one of these returns was indorsed upon the execution in question, they must find for the plaintiffs the amount thereof, with interest. Which was given.

The defendant then prayed the court for leave to amend the return on the execution, so as to correspond with the facts in the case, which was refused by the court.

The jury were then charged, that if the defendant had satisfied them that he had a reasonable excuse for failing to return the execution, their finding should be for the defendant. Thereupon the defendant prayed the court to charge the jury, that the officer was not required to use extraordinary diligence, and that ordinary diligence was all that was required by the law. Which charge was refused, and the jury were instructed, that the court would not undertake to distinguish between ordinary and extraordinary diligence, and that they had been charged as to the sufficiency of the excuse, in the language of the court in the case of *Roberts & Battle v. Henry*, and that the sufficiency of the excuse was a question for their determination. To all of which charges, and refusals to charge, the defendant excepted, &c.

J. FALKNER, for the plaintiff in error, contended, that it is a general rule in all courts of record, that every thing necessary to make out the plaintiff's case must be averred in the declaration. If this is not done a demurrer will be sustained. In this case it is not averred in the notice, (which is used as the declaration,) that Casky was sheriff at the return

day of the execution, therefore the demurrer should have been sustained. 1 Ala. Rep. N. S. 330.

The charge of the court, that unless one of the returns in Clay's Dig. 200 and 201, was indorsed on the execution was contrary to law, and virtually decided the case in advance of the verdict of the jury. But if this charge was correct, the amendment should have been allowed. 7 Ala. R. 830.

The jury should have been instructed what in law was a sufficient excuse, and charging them in the language of the court in the case of Roberts & Battle v. Henry, 2 S. 42, was not applicable to the case made by the proof.

It was the duty of the court to decide what amounted in law to a sufficient excuse, and then leave it to the jury to determine from the facts in proof, whether such case had been made out or not, leaving the sufficiency of the excuse to their determination, was therefore error. Ordinary diligence is all the law requires from an officer to whom process is entrusted. 2 Ala. R. 43 ; 9 Id. 83.

The case made by the proof, amounted in law to a sufficient excuse for not returning the execution, and the court should so have told the jury, if they believed the evidence to be true. If the charges given are erroneous in the abstract, they were well calculated to mislead the jury.

A return of the execution to any person but the clerk, or a sworn deputy, would have been no return in law.

The declarations of Casky should not have been received, the execution being in the hands of Moore, the deputy. See Dumas & Co. v. Patterson, et al. 9 Ala. R. 484.

L. E. PARSONS, for the defendants in error, made the following points :

1. The notice states, the motion will be made for the amount of a writ of *fieri facias*, and this has been held sufficient to indicate its character. McRae, et al. v. Colclough, 2 Ala. R. 74 ; Crawford v. Chandler, 5 Ib. 61.

2. The judgment entry will be looked to alone by the court in this case, to determine whether the notice is sufficient ; and the facts there disclosed show that it is. The plaintiffs in error do not make it a part of their bill of exceptions, and the notice is no part of the record unless this is

done—at least it cannot be taken to contradict the facts recited in the judgment. *Armstrong v. Robertson*, 2 Ala. R. 164; 4 Ib. 516; 1 Stew. 442; 8 Porter, 372; 8 Ib. 99.

3. The statute prescribes the exact terms in which a sheriff's return shall be made. *Clay's Dig.* 200 and 201, § 1. And this court has in one or two instances put the question, whether he is not bound to follow it literally.

4. The failure to return according to law being shown, it was the sheriff's duty to show a reasonable excuse for this negligence. *Roberts & Battle v. Henry*, 2 Stew. 42.

COLLIER, C. J.—1. We do not perceive any objection to the notice. It was sufficient to alledge that Casky was sheriff when the *fiery facias* was placed in his hands, without averring the continuance of his official character up to the time when the same was returnable. If the determination of his office between the periods of the receipt and return of the execution, could have availed any thing in the defence, it devolved upon him to show the fact; and it was not incumbent on the plaintiff to prove the reverse. This proposition is so entirely consistent with legal analogies, that argument is unnecessary to illustrate it.

2. The act of 1807, (*Clay's Dig.* 200, *et seq.* § 1,) prescribes the forms of returns to be made by a sheriff or other officer, to a *fiery facias*, and other writs of execution; but these forms have never been considered as exclusive of all others, which express the same meaning. In *Barton v. Lockhart*, 2 Stew. & P. Rep. 109, it was held, that the return of "satisfied," on a *fiery facias*, sufficiently indicated that the amount thereof had been received by the sheriff, at a time when it was in full force; and this although the statute return employs terms altogether different. And in *Haden, et al. v. Walker*, 5 Ala. Rep. 86, we decided that where a sheriff returned an execution thus, "the defendants in this case have settled with plaintiff's attorney, as *per* order of same—costs and commissions paid to sheriff," the fair inference was, that the execution had been fully satisfied; and that no subsequent execution could issue without the authority of the court in which the judgment was rendered. It was added, "In respect to *mesne* process, it has been held, that the she-

riff is not confined to the statute form in making his return, but his indorsement upon a writ, that the defendant had acknowledged service, was sufficient to bring the party into court, though the statute requires that a copy of the process shall be left with the defendant. *Rowan v. Wallace*, Judge, 8c. 7 Porter's Rep. 171. No reason occurs to us for a rule less latitudinous in the execution of *final* process; the more especially as in both cases the sheriff is subjected to severe inflictions, either for a false return or the arrogation of power." See 1 Porter's R. 30.

The return in the case before us is not only informal, but it is substantially defective. It states the levy on and sale of certain lands, and the appropriation of the proceeds to older executions; but does not affirm that the defendants have no other property from which the residue of the execution can be satisfied. The statute referred to is explicit in making this latter requisition. Without it, the return is equivalent to stating that "no money is made," which has been adjudged insufficient. *Minor's Rep.* 48. From this view it follows, that although the county court ruled the law incorrectly, yet as the return is fatally defective, no injury has resulted to the defendants, and the mistake furnishes no warrant for the reversal of the judgment.

3. In respect to the motion by the sheriff to amend the return on the execution, it may well be questioned, whether, if it had been allowed, it could benefit the defence. See 6 Ala. Rep. 172. But be this as it may, its refusal was a matter independent of, and collateral to the judgment in the case at bar, and cannot be revised on error. *Kemp & Buckey v. Porter*, 6 Ala. Rep. 172, is conclusive on this point, and shows, that if the defendants have been prejudiced by a denial of the motion, the remedy is by *mandamus*.

4. If the defendants had desired the court to inform the jury more particularly, what would have been a sufficient excuse for not returning the execution, they should have prayed specific instructions growing out of, and suggested by the proof. What will constitute such an excuse must depend upon the facts of each case; and to say to the jury, that a sheriff is liable for not returning an execution, unless he has shown an excuse for the failure, is not the reference of a le-

gal question to the jury, or a devolving upon them the appropriate duties of the court. We have repeatedly held, that a judgment will not be reversed, merely because a charge, legal in itself, may not be sufficiently full, or is calculated to mislead the jury—in such case it is proper to ask an additional or explanatory charge.

5. It certainly was not the duty of the sheriff to return the *fieri facias* to any one else than the clerk or his deputy. As for the persons who occasionally acted for the clerk, he was under no obligation to recognize them. But he should have used all reasonable diligence to make a due return to the clerk. Whether this was done is a question depending upon facts, and which must be solved by the jury under the ruling of the court.

6. The declarations of the sheriff were objected to on the ground, that they were made at a time when his sureties and codefendants were not present. The fact on which the objection was rested, certainly furnishes no exclusive test of the admissibility of such evidence. Perhaps the declarations constituted a part of the sheriff's acts, in respect to the execution, and were admissible as entering into the *res gestae*. If such were their character, they were competent evidence, and there is nothing in the record to negative such an hypothesis. See 7 Ala. Rep. 830; 9 Id. 484. We must then intend, that the ruling of the county court on this point, was conformable to law, as the reverse was not shown.

7. It is not necessary, in a case like the present, that the jury should be satisfied beyond a reasonable doubt, that the facts which make out the plaintiff's case, or defence, have been proved. All that is necessary, is, that there should be such a preponderance of proof as will convince the judgment, by applying the ordinary tests for the ascertainment of truth. And as for the distinction between diligence ordinary and extraordinary, in the return of an execution by a sheriff, we cannot very well perceive any room for its operation. But be this as it may, the facts do not show any extraordinary diligence, and as the defendants could not have been prejudiced by the refusal of the county court to charge the jury

on this point as prayed, the refusal is not a fatal error. This view is decisive of the case, and the judgment is therefore affirmed.

CASLY, ET UX. V. GILDER, EX'X.

1. A legacy payable when the legatee becomes of age, if it can then be paid without a sale of the property, and if not, then to be postponed until the youngest child comes of age, cannot be coerced from the executrix, without establishing, that the legacy may be paid, without a sale of the property of the estate.

Writ of Error to the Orphans' Court of Chambers.

THE plaintiffs in error, filed their petition in the orphan's court of Chambers county, setting forth that the testator, by will bearing date the 4th of June, 1838, thereby gave and bequeathed Mary A. M., now the wife of Warrenton Casly, \$600, to be paid to her in cash when she should become of age. That he appointed his wife, and one William Casly, executors thereof. That the bill was duly protested, and letters testamony granted to the executors, but that William Casly had resigned, and that Frances Gilder, the widow, is now acting as the sole executrix. That the petitioners have intermarried since the probate of said will, and that the legatee, Mary A. M., is now of full age. They aver, that the estate of said testator is solvent, and that more than eighteen months have elapsed since the grant of letters testamentary, and that the legacy bequeathed to the wife of the petitioner, remains unpaid, and concludes with a prayer, that the executrix, Frances, pay said legacy. The executrix appeared and pleaded to the petition, why she should not now pay said le-

gacy, that by the terms of said will, said legacy should be paid when the said legatee became of full age, provided it could be done without a sale of the estate of the testator, and averred that it could not be done without such sale. And further, that by another and later item of said will, the defendant, as executrix, was to control and use the estate of the testator, consisting of the land and negroes, to the best advantage, for the purpose of educating and raising the children of the testator, until the youngest became of age. That the youngest child is still a minor, and that the land and negroes named in this item, embrace the whole of the estate of the testator at the time of his death. To these pleas the petitioner demurred, and judgment was rendered overruling the demurrer. The petitioners did not reply, and the petition was dismissed. The overruling the demurrer is assigned for error.

ALLISON & GOODMAN, for the plaintiffs in error.

BAUGH, contra.

DARGAN, J.—The question seems to be settled, by the decisions of this court, that the orphans' court, upon the petition or application of a legatee, can award payment of a legacy to be made by an executor, although the estate be not in a condition to admit of a final settlement, if according to the terms of the will, the legacy be then payable. 8 Ala. Rep. 497. Relying on the authority of this case, I waive the consideration of the question, whether the orphans' court has jurisdiction to take cognizance of a petition for the payment of a legacy merely, and to render judgment thereon, in favor of the legatee, leaving the estate in the hands of the executor unsettled.

The petition is for the payment of a legacy, and being filed, a rule was made on the executrix, to appear before the orphans' court, and show cause why she should not pay over the legacy to the petitioners bequeathed by the last will of the testator. The executrix appeared, and pleaded to the petition, that the legacy was to be paid to Mary A. M. Gilder, now the wife of the petitioner Casly, when she became of age, provided it could be done then without a sale of the pro-

erty, which consisted of land and negroes only; and that by a later clause in said will, the defendant, as executrix, was to use and manage the property, to the best advantage, for the purpose of educating and raising the younger children of the testator, until the youngest child became of age; and then averred, that the youngest child was still a minor. To this plea the petitioners demurred.

The plea to the petition is, in substance, that the legacy is not now payable, because it was not to be paid to the wife of the petitioner when she became of age at all events, but only if it could be done without a sale of the property; and if it could not be done without a sale of the property, then the payment of the legacy should be postponed until the youngest child became of age.

If this is the construction of the will, then it will be necessary for the petitioners to show, that the executrix could pay the legacy without selling the property. But whether this is the proper construction of the entire will, we have no means of determining, as the will is not set out in full. The demurrer admits the truth of the allegations of the plea, and the plea within itself shows a sufficient cause why the executrix should not now pay the legacy.

The judgment of the orphans' court overruling the demurrer, and dismissing the petition, as the petitioners declined to plead over, is not erroneous, and therefore is affirmed.

HAVIS v. TAYLOR.

1. When one party introduces irrelevant testimony, the other may rebut it, and it cannot be objected that the fact which it was offered to rebut was irrelevant.
2. A record of a judgment properly certified, is evidence of the fact that such a judgment exists, against strangers, as well as parties and privies.
3. In a suit for wrongfully, and vexatiously suing out an attachment, a decla-

Havis v. Taylor.

ration by the plaintiff about a week before the attachment issued, of his intention to leave the State temporarily, not made in the presence of the defendant, or shown to have come to his knowledge previous to the issue of the attachment, is not admissible in evidence.

4. Proof of general reputation in the neighborhood, that the plaintiff was about leaving home for Arkansas, on a visit, is also inadmissible.
5. Declarations of the plaintiff, after the attachment issued of his intention in leaving the State, are not competent.

Error to the Circuit Court of Chambers. Before the Hon. G. W. Stone.

ACTION on the case, by plaintiff against the defendant, for wrongfully and vexatiously suing out an attachment. Plea, not guilty. Verdict and judgment for the defendant. The facts sufficiently appear in the opinion of the court.

S. F. RICE, for the plaintiff in error.

1. The action is for the wrongful and vexatious suing out of an attachment, and also for a wrongful and vexatious and excessive levy. The several decisions of the court excepted to, are clearly contrary to law. *Pitts v. Burroughs*, 6 Ala. R. 733; *Powell v. Olds*, 9 Ala. R. 861; *Powell v. Olds*, 7 Ala. R. 652.

2. The declarations of the plaintiff as offered were clearly admissible; especially the declarations made by him a few days (about a week) before the attachment was sued out. His intention in going to Arkansas, was a material question; it was important to the ends of justice, to show whether he intended to go to Arkansas for a particular purpose and to return, or whether he intended to remove from this State. From the necessity of such a case, the declarations of the party, made within any reasonable time before his departure, must be admissible in the determination of such a question. *Pitts v. Burroughs*, 6 Ala. Rep. 732.

4. After it was shown the defendant had heard something about the plaintiff's intending to go to Arkansas, and about his object in going to Arkansas, and about his intention to return, and after the defendant had been allowed to show this by his own witnesses in his defence, it should have been al-

lowed to the plaintiff to countervail this testimony and strip it of its seemingly mitigating character, by showing the general notoriety of defendant's neighborhood, of plaintiff's intended trip to Arkansas, and of the object of that trip. The evidence offered by counsel, and excluded, was good in aggravation of damages, if for no other purpose, because it tended irresistibly to show the recklessness and rashness and wantonness of the defendant's conduct. It would have showed that by reasonable inquiry in the neighborhood, the defendant could not have failed to ascertain that there was no ground for an attachment. *Lawson v. Orear*, 7 Ala. Rep. 784; *Br. Bk. v. Parker*, 5 Ala. Rep. 731; *The State v. Cochran*, 2 Dev. Rep. 63.

4. The evidence of the return of no property found as to Walker, was not admissible as against Havis, the plaintiff.

J. E. BELSER and G. W. GUNN, for the defendants.

1. What the plaintiff said, one week before the issuance of the attachment, is no part of the *res gestae*. *Hodge v. Thompson*, 9 Ala. 131; *Yarborough v. Moss*, *Ib.* 382. Further, admissions of a party are evidence against himself, but will not authorize the introduction of proof of counter declarations made at a different time, and such is the attempt in this case. *Lee v. Hamilton*, adm'r, 3 Ala. 533.

2. The declarations made by plaintiff, a day or two before leaving for Arkansas, are liable to the same objections, and to the additional one, that it was uttered after the issuance of the attachment. *Pitts v. Burroughs*, 6 Ala. 733; *Prosser v. Henderson*, 11 Ala. 484; *Easley v. Cox*, *Ib.* 362; *Bradford v. Haggerty*, *Ib.* 698.

3. The neighborhood report, before the issuance of the attachment, that plaintiff was going to Arkansas, and that he would return in a short time, was properly excluded. *Pitts v. Burroughs*, 6 Ala. 734; *Powell v. Governor*, 9 Ala. 36.

4. Evidence having been adduced as to the solvency of Walker, it was competent for the defendant to refute it in the manner pursued by him. *McNeil's ex'rs v. Reynolds*, 9 Ala. 313; *Ansley v. Carloss*, *Ib.* 973.

CHILTON, J.—The plaintiff, having offered evidence

tending to show that one Walker, who was jointly liable with him upon the demand on which defendant had sued out the attachment, was solvent, the defendant offered the record of a judgment rendered in the Montgomery circuit court, which appeared unsatisfied against said Walker, to rebut the plaintiff's proof; this evidence was objected to by the plaintiff, but allowed by the circuit judge. The plaintiff's counsel now insists that the proof of solvency offered by the plaintiff was irrelevant, and in this we agree with the counsel, but he further insists, that the proof being irrelevant, did not warrant the rebutting evidence of insolvency. The effect of the rebutting proof was to neutralize the proof offered by the plaintiff, and as the introduction of his proof rendered it necessary, he should not be heard to complain. In *Findley v. Pruitt*, 9 Porter's Rep. 195, it was held that where a defendant was improperly permitted to assail the character of the plaintiff, although such proof is irrelevant, it is not erroneous to permit the plaintiff to countervail it by proof of good character. Although, as a general rule, none but parties and privies are bound by judgments, yet the record, properly certified, is evidence that such judgment existed. See *Lawson v. Orear*, 7 Ala. Rep. 784; *Ansley v. Carlos*, 9 Ala. Rep. 973. The fact that it was rendered in the county of Montgomery, when Walker lived in Chambers, does not go to the legality of the proof, but only its sufficiency. If the plaintiff desired to raise any question as to its effect, he should have asked the court for a charge involving it. *McNeill's ex'rs v. Reynolds*, 9 Ala. Rep. 313.

2. It is insisted by the plaintiff's counsel that the declarations of the plaintiff, made a few days anterior to the issuance of the attachment, are evidence, as explaining his intention, that he intended leaving the State temporarily. No effort was made to show that the defendant was advised of these declarations before he sued out the attachment, nor is it pretended that he knew, or had heard of them. We cannot see upon what principle they can be allowed. Declarations accompanying an act of a party, from the proof of which act, an inference is sought to be drawn prejudicial to him, are received in evidence, as characterizing it, and as explanatory of the intention with which it is done. *Yarbrough v. Moss*, 9

Ala. Rep. 382. But to form a part of the *res gestae*, such declarations must have been made at the time the act was done, which they are supposed to characterize, and must be calculated to elucidate and unfold the nature and quality of the facts they were intended to explain, and so to harmonize with those facts as obviously to constitute one transaction. *Enos v. Tuttle*, 3 Conn. Rep. 250; *Phil. Ev. Notes*, 585, 589; *Greenl. Ev.* 122, 123, 133. The declarations attempted to be proved in this cause were made a week before the attachment issued, and were accompanied by no act to be explained, and at most, amounted only to the statement by the plaintiff to a third person of what he then intended to do at a future time. They were clearly inadmissible by any rule of evidence, and were properly rejected by the court. The case of *Pitts v. Burroughs*, 6 Ala. Rep. 733, does not sustain the position assumed by the counsel for the plaintiff, but is in harmony with the views above expressed. That case decides, that what a party said *upon leaving home*, or *immediately* preceding his departure, is admissible as forming a part of the *res gestae*, as evidence in his favor. Here the act to be explained was his departure from home, and his contemporaneous declarations show his intention. In the case before us, the declarations are not offered to explain a fact with which they are connected, but as constituting independent facts of themselves. *Lee v. Hamilton*, adm'r, 3 Ala. Rep. 533.

3. The proof offered by the plaintiff, "that it was generally reputed in the neighborhood in which he lived, that he was going to Arkansas on a temporary visit, and would shortly return," was properly excluded. The cases of *Pitts v. Burroughs*, *supra*, and *Powell v. The Governor*, 9 Ala. Rep. 36, are conclusive upon this point, to show the proof illegal.

4. The declarations of the plaintiff, made after the attachment issued, even had they been connected with his departure, could not, upon any legal principle, have been received as evidence for him. To allow such ptoof, would be to permit the party by his declarations to manufacture proof for himself. The case of *Cox v. Easley*, 11 Ala. Rep. 362, is pointed to show the exclusion of the declarations was

proper. It results from what we have said, there is no error in the record, and the judgment of the circuit court is therefore affirmed.

SMITH'S HEIRS v. SMITH'S ADM'R.

1. The widow of one deceased, has no right to occupy a plantation belonging to her husband, several miles distant from his residence, in a town, as keeper of a hotel, until it is allotted to her, as part of her dower; consequently cannot retain the rents upon the ground of *quarantine*.
2. Partial settlements made by an administrator, are not *res adjudicata*; either party may, upon final settlement, show an error in the accounts, and the court may examine all matters of debit and credit, from the time the administration commenced, and render such decree as may be proper, upon a view of all the facts.
3. If an administrator receives money or property, to which he is not entitled in his representative character, although he cannot hold it against the party entitled to it, yet the orphans' court cannot take it into the account, and render a decree against him therefor, on the settlement.
4. The orphans' court cannot confer authority upon an administrator, to receive the rent of lands situate in another state, and if he does receive it, he cannot be required to account for it as administrator, unless it be shown that it was received *virtute officii*.
5. The orphans' court cannot award damages to the widow, upon the allotment of dower.

Error to the Orphans' Court of Perry County.

UPON the final settlement of the accounts of an administrator of the intestate, the heirs and distributees of the estate excepted to the ruling of his honor J. P. Graham, presiding judge. It appears from the bill of exceptions, that the administrator claimed a credit of \$3,344 80, to the allowance of which the heirs and distributees objected. On the settle-

ment it was admitted that the intestate died in the summer of the year 1838, possessed of a large real and personal property; that he resided in Aberdeen, Mississippi, from the first of January of that year until his death; that he owned and kept the "Aberdeen Hotel," and at the same time owned and carried on a plantation from seven to nine miles distant from Aberdeen, and in the same county.

On a partial settlement of the intestate's estate, in the year 1844, the administrator received a credit for the rents of the "Aberdeen Hotel," as a part of the dower interest of the widow of the intestate, with whom he had intermarried—having charged himself in his account, upon a partial settlement, with all the rents, both of the lands and the hotel.

In the early part of the year 1844, the wife of the administrator petitioned for dower in the real estate of her deceased husband, and the same had been allotted to her. In that allotment was included the "Aberdeen Hotel," as well as the entire plantation which the intestate cultivated at the time of his death. The sum of \$3,344 80, for which the administrator claimed a credit, was the rent of that plantation, from the death of the intestate until the allotment of dower in 1844.

Upon the marriage of the administrator with the widow, a settlement was made, securing her property to her, which had been proved and recorded in Perry county, previous to the consummation of the marriage.

The heirs and distributees produced and read to the court, a notice from the wife of the administrator, addressed to the judge of the orphans' court, as follows: "You are hereby notified, that I desire not to have the rents of my dower interest in the lands allotted to me as dower, out of the estate of my deceased husband, from his death to the allotment of dower in 1844, but desire that the same may lapse into the estate as assets.

RUTH WILEY."

It was admitted by the heirs, that Mrs. Wiley, by her trustee, had filed a bill in chancery, in Dallas county, the residence of the administrator, for her separate interest in the

estate of the intestate, and in that bill claimed the rent above named; but the trustee being present, proposed to have the bill amended in that particular, by striking out the claim for rent.

By a duly authenticated copy of a statute of Mississippi, it was proved, that the widow was entitled to one fifth part of the personal property of her deceased husband, and that in respect to her dower in the lands, the law of Mississippi is identical with that of Alabama, as found in Clay's Dig. 172, 173, § 3-7.

The original administration on the intestate's estate was granted in Monroe county, Mississippi, where he died—the administrators in that State resigned, and subsequently, a considerable portion of the estate having been removed to Alabama, the present administrator here, administered, and the credit he claimed was allowed him.

A. B. MOORE, for the plaintiffs in error, insisted that Mrs. Wiley was not entitled to the rents of the plantation in Mississippi, unless they were assigned her as a part of her dower, or at least until the land out of which they arose was allotted to her—the “Aberdeen Hotel,” where her deceased husband lived and died being disconnected with it. The statute which authorizes a widow to retain possession of the house, plantation, &c. free of rent, until her dower is assigned her, will not give her the rents for the same if she abandons the possession and cultivation, and permits the premises to go into the possession of the administrator, or to be rented out by him.

If the administrator took possession of the plantation, leased it out, and charged himself with the rents, the money thus received by him became assets in his hands, and he cannot be allowed a credit for the amount, upon the ground that his wife, as the widow of a former husband, was entitled to the possession free of rent. Conceding however, that the widow had a right to the rent, the proof shows that she voluntarily relinquished it.

A. GRAHAM, (of Perry,) for the defendant in error, contended that the administrator had improperly charged him-

self with the rent, and the orphans' court only allowed the charge to be corrected. 9 Ala. Rep. 330. The rent of land accruing after the death of the ancestor was not assets at common law, and no statute of Mississippi is shown which makes it such; but if assets in that State, the orphans' court of Perry has no jurisdiction over lands there, or of rents which may accrue from them. Story's Confl of L. § 514, a and b.

The rent of the plantation was due the widow as damages for the detention of her dower from the death of her husband until its allotment, and the heirs and distributees cannot claim it. 1 Roper on H. & W. 439; 4 Kent's Com. 65; Sedg. on Dam. 128. If the statute of Merton is not in force in Mississippi, the act extending the widows *quarantine* till the allotment of dower, bars the heirs from claiming the possession of, or rent for, the last residence of the deceased husband, and the plantation pertaining thereunto. 4 Kent's Com. 62. The rents received by the administrator were not assets in his hands, but are to be held by him absolutely, in virtue of his marital rights, or as a trustee for his wife, under the marriage settlement. 2 Kent's Com. 130, 134.

The offer of the wife to relinquish her right to the rents, and allow them to become assets, and of her trustee to amend the bill filed, would, if permitted, have devolved upon the orphans' court the administration of a difficult head of equity jurisdiction, which its powers do not permit it to exercise. If the rents were not assets in the first instance, Mrs. Wiley could not make them such by expressing a wish that they should be so considered. The renunciation by the widow of her right to the rents in favor of the heirs and distributees, might entitle them to sue the administrator for the amount, but they cannot recover it on a settlement with the orphans' court, and thus charge himself and sureties.

If the rents were assets in the administrator's hands, perhaps *Graham v. Abercrombie*, 8 Ala. Rep. 558, might have some application; but it has been shown that they are the profits of the widow's separate estate.

The widow is entitled to the rents of the mansion house and plantation of her deceased husband, whether she resides thereon or not. 6 Monr. Rep. 562; 7 Id. 338, 642. If a

husband, living with his wife, receives the profits of her separate estate, it will be intended to be with her consent, and she cannot compel him to account, or divest his right at her mere pleasure. 2 Ves. jr. Rep. 698; 11 Id. 225; 2 Ves. & B. Rep. 36; 17 Johns. R. 548.

COLLIER, C. J.—The act of 1812, “concerning dower,” enacts that the widow shall be endowed of “one third part of all the lands, tenements and hereditaments, of which her husband died seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower, as heretofore provided for by law; in which said third part shall be comprehended the dwelling house in which her husband shall have been accustomed most generally to dwell, next before his death, together with the offices, out-houses, buildings, and other improvements thereunto belonging, or appertaining,” &c. *Further*, the widow may “file her petition in the circuit or county court of the county where her husband shall have usually dwelt, next before his death, setting forth the nature of her claim, and particularly specifying the lands, tenements and hereditaments, of which she claims dower, and praying that her dower may be allotted to her.” The proceedings upon such petition shall be summary, and the court shall at the first term when such petition is filed, proceed to hear and determine, as to them shall seem just and right. *Again*: “It shall be lawful for the widow to retain the full possession of the dwelling house in which her husband most usually dwelt next before his death, together with the out-houses, offices or improvements, and plantation thereunto belonging, free from molestation and rent, until she shall have her dower assigned her.”

In *Weaver & Gaines v. Crenshaw*, 6 Ala. Rep. 873, it was held, “until dower is assigned to the widow, she has no estate in the lands of her deceased husband. The widow’s *quarantine*, by our statute, does not extend beyond the right to occupy the dwelling house, out-houses, &c., until her dower is assigned. Until then, she has no estate in the lands of her deceased husband, but a mere right to have her dower allotted to her.” So it has been decided, that “damages

are properly the mesne profits arising after the death of the husband, and before the suit for dower. These were not allowed at common law, but were given to the widow by the statute of *Merton*. In this case, the chancellor has properly restricted the widow in the recovery of profits, to the time of the institution of the suit, the defendant being a purchaser. As against the heir, the rule would have been different, and damages would have been recoverable from the death of her husband. But whatever may be the rule at law, in equity the established doctrine is, to allow the widow the mesne profits as damages; and this not by analogy to the allowance of damages under the statute of *Merton*, but on the ground of title. This is decisively settled in the leading case of *Curtis v. Curtis*, 2 Brown's Ch. Rep. 619; *Beavers & Jemison v. Smith*; 11 Ala. R. 20. Let this notice of our statute law, and the decisions of this court suffice to guide us to a conclusion.

As the record states, the intestate resided in Aberdeen, and owned and kept the "Aberdeen Hotel," at the time of his death, it must be intended, that if the hotel was not his dwelling house, that he at least dwelt in that town. The plantation was seven or eight miles distant, and it cannot with any propriety be said that it belonged to the house in which the husband of Mrs. Wiley "most usually dwelt, next before his death," merely because it was situated in the same county. There was no particular connection between the house in town and plantation, other than they both had the same proprietor; this merely proves that the plantation *belonged* to the intestate, and not that it was attached to the house. If a plantation, seven or eight miles from a residence in town, may be regarded as appertaining to it, when the deceased husband had no plantation nearer, may not one twice, or even ten times the distance be considered in the same predicament? However the law may be, where one has a homestead in a town or the country, disconnected with his plantation, and his business is planting, his residence being selected with a view to health or society, we think the connection within the meaning of the act cited, cannot be maintained, where (as in this case,) the husband was the

proprietor of a hotel in town, occupied and kept it open. Mrs. Wiley, as the widow of the intestate, had no right to occupy the plantation of which the latter died possessed; and her present husband, in virtue of his marital rights, was not authorized to take and retain the possession until it was allotted to her as a part of her dower; and consequently cannot vindicate the retention of the rents upon the ground of the wife's *quarantine*.

Partial settlements made by an administrator are not *res adjudicata*; either party may, upon final settlement, show an error in the accounts, and the court may examine all matters of *debit* and *credit*, from the time the administration commenced, and render such decree as may be proper upon a view of all the facts. 9 Ala. Rep. 615; see also, *Id.* 330. Now, although the administrator may have charged himself with the rent of the plantation, it is clear that if he was not thus chargeable by the orphans' court, it was competent for him to show, and the duty of that court to make the correction.

We assume it as a postulate, that if an administrator receive money or property belonging to the estate of his intestate, to which he is not entitled in his representative character, although he cannot hold it against the party legally entitled, yet the orphans' court cannot take it into the account, and render a decree against him therefor, on the settlement of the administration. A court of law, proceeding according to the ordinary forms, or a court of chancery, may hold him accountable, and render complete justice.

In *Leavens v. Butler, et ux.* 8 Porter's Rep. 380, we said, neither the common or statute law, give to an executor *virtute officii*, a right to the possession of the testator's lands. If they are devised, they pass by the will to the devisee, who has the right of entry and possession—if undevised, they descend to the heirs, who are entitled to the possession. If the lands are required to pay debts they may be sold under the order of the orphans' court, upon the application of the personal representative, notwithstanding the possession of the devisee or heirs. We also said, in *Terry v. Ferguson, Id.* 500, "It is clear that the duties of an administrator do not require, or even authorize him in the ordinary course of ad-

ministration, to exercise a control over the real estate of his intestate ; yet if he assumes to lease it, he will hold the rent *in trust* for those legally entitled." Subsequent to these decisions, a statute was enacted, making it lawful "for executors and administrators to rent at public outcry, the real estate of any decedent, until a final settlement of the estate of the said decedent is effected, and that the proceeds shall be assets in the hands of such executors or administrators." This act, it has been held, can only have a prospective effect, (1 Ala. Rep. N. S. 226,) and we may add, it cannot operate *extra territorium*, as the orphans' court cannot confer upon the personal representative an authority or control over the lands of the deceased situated in another State. 8 Ala. Rep. 380 ; see also 7 Ala. Rep. 906.

We have repeatedly held, that the power and extent of the jurisdiction of the orphans' court, is necessarily limited by the legislative acts which prescribe its authority and manner of proceeding. That court cannot award damages to the widow upon an allotment of dower ; nor does the circuit court possess such a power under our statutes. The case cited from 11 Ala. Rep. explicitly states, that the court of chancery is alone competent to extend such a measure of relief to the widow. It is not pretended that damages have been adjudged to Mrs. Wiley, but only that she was entitled to them, as accessorial to her right of dower.

It does not appear that the statutes of Mississippi have modified the law of dower since the separation of the territory of that State from this, in 1817 ; nor does it appear that the present administrator received the rents from his predecessor in Mississippi, or whether he leased them to some third person, or charged himself as an occupant with the rent. What has been said will sufficiently show, that there is nothing in the record to indicate that the administrator received the rents *virtute officii* ; but in the condition in which the cause is presented, the reverse is rather inferable ; consequently he cannot be required to account to the orphans' court.

We have already said, that if he is not authorized to retain them, he may be compelled to pay them over to the dis-

tributees, trustees of his wife, or whoever may be entitled. But relief must be sought in the appropriate tribunal. It follows from what has been said, that the decree of the orphans' court must be affirmed.

CRUTCHFIELD v. EASTON.

6. An indorsement of a note, may be made upon the paper, on which a torn note is pasted, so as to vest the legal title in the indorsee. It is not necessary in such a case, any more than in an indorsement on the note itself, to prove when it was made.

Writ of Error to Randolph Circuit Court. Before the Hon. S. Chapman.

THE defendant in error, sued the plaintiff, on a note executed by him to one Crook, and indorsed to the defendant in error. On the trial, a bill of exceptions was taken, which shows that the note had been torn into three pieces, but the pieces had been laid together, and pasted to another piece of paper, about the size of the note, and the indorsement made on the back of this piece of paper, from Crook the payee, to the defendant in error. The plaintiff in error objected to the note, and the indorsement as evidence, but the objection was overruled.

The court charged, that an indorsement on a piece of paper, separate from the note, would not pass the legal title; but if the jury believed, that the note was pasted on the piece of paper to preserve it, and that such pasting was necessary to preserve the note, that an indorsement on the paper, to which the note was pasted, was a good indorsement to pass the legal title. This charge is now assigned as error.

M. A. & J. H. Myatt v. Lockhart and Massey.

RICE, for plaintiff in error.

L. E. PARSONS, contra.

DARGAN, J.—An indorsement is generally made, by writing the name of him, in whom is vested the legal title to the note, or bill, on the back thereof; but an indorsement on the face of the bill, has been held good; and indorsements made on a piece of paper, attached to the bill, called an *al-longe*, are frequent, and will pass the legal title to the indorsee. See Chitty on Bills, 226; 16 East, 12; Yarborough v. The Bank of England. If the note was torn into three pieces, and was pasted to the piece on which the indorsement was made, it did not thereby lose its negotiable qualities, and could be indorsed by writing the name of the payee, on the back of the paper to which it was pasted. This is not denied by the counsel for the plaintiff in error, but he contends, that in the absence of proof, when this indorsement was so made, *either before, or after suit brought*, should have been shown. The same objection could be urged against any blank indorsement on the identical piece of paper, on which the note or bill is written. The production of the note, and the indorsement is *prima facie* sufficient to entitle the plaintiff to recover; and if the plaintiff had no right to sue, or if he had not acquired the right to sue at the time suit was instituted, it devolved on the defendant below to prove it.

There is no error in the record, and the judgment is affirmed.

M. A. & J. H. MYATT v. LOCKHART AND MASSEY.

1. In a contest between the plaintiff in attachment and a garnishee, the defendant in the attachment is a competent witness to prove that before the attachment issued, he had transferred the note sought to be condemned

- for a valuable consideration, to a third person, who has assigned it to the garnishee—his interest being balanced, or preponderating against the garnishee who offers him. [The head note in *Scott, Slough & Co. v. Stallworth*, 12 Ala. Rep. 25, corrected.]
2. But such third party, being liable once upon his transfer to the garnishee in the event the plaintiff in attachment succeeds, is not a competent witness, although, upon his *voir dire*, he disclaims any interest in the event of the suit.

Error to County Court of Perry.

THE defendants in error were garnisheed to answer what they were indebted to Johnson & Patton, against whom, the plaintiff in error had sued out an attachment, returnable to the county court. They answered, denying indebtedness, but stated that two notes were placed in their hands, for small amounts, payable to Johnson & Patton, and which were handed them as attorneys at law to collect, by one Dearing, to whom they had executed the usual receipt. That said receipt had been assigned by said Dearing to George P. Massey. That suits were brought on the notes for the use of Lockhart, one of the defendants, in the name of Johnson & Patton. Judgments rendered,—the money was collected and by them paid over to George P. Massey, the assignee, before service of the garnishment on them. The answer was contested under the statute, and notice issued to Dearing to come in and contest, who makes default, and an issue was then made up between the plaintiff and defendants in error. Upon the trial, the defendants offered Johnson, one of the defendants in the attachment, to prove a transfer of one of the notes made by him to Dearing on good consideration, before the attachment issued, who was allowed to be examined against plaintiff's objection. The defendants then offered Dearing, who had transferred the receipt of the garnishees to him, to the said George P. Massey. This witness swore he was not interested in the event of the suit, and was allowed to testify, the plaintiffs excepting, &c. The decisions of the court in ruling Johnson and Dearing competent witnesses, are assigned for error.

H. DAVIS, for plaintiffs in error.

No counsel for defendants.

CHILTON, J.—The witness, Johnson, was clearly competent. If he had any interest, or rather, if his interest was not completely balanced, it preponderated in favor of the plaintiffs in error; for having sold and assigned the note to Dearing, as he states, for a horse which he obtained, he may be interested in making it pay a debt which he owes the plaintiffs, and thus avail himself of it twice. See Hallet and Walker v. O'Brien, 3 Ala. Rep. 455; Holman v. Arnet, 4 Por. Rep. 53. This view does not conflict with the principle settled in Scott, Slough & Co. v. Stallsworth, 12 Ala. 25, although the head note in that case states that in a contest between creditors on a garnishment, the *debtor*, under the act of 1845, is not a competent witness. Still, the facts in that case show the debtor was the *defendant in execution*. To extend the statute by construction to all controversies between the creditors of *a debtor*, so as to exclude the latter from being a witness, would work an important and radical, as well as a very inconvenient change in the law of evidence, and the more so as it might apply as well in chancery as at law. Had the legislature intended to exclude the defendant in the attachment as a witness in trials upon contested garnishments, as well as defendants in execution, we apprehend the intention would have been expressed, and not left to doubtful construction. The leaning of courts in all doubtful cases, is to allow the witness to testify,—the objection, if any, going to his credibility, not to his competency.

The witness, Dearing, does not stand in the same position. He is the vendor, or the party who has transferred the *choses in action* to one of the defendants, and is interested in sustaining his sale; being, as we must infer, liable over to Massey, should the demand he has transferred be condemned. True, he states he has no interest in the event of the suit, but the law raises the interest from the facts shown to exist, and while the witness may very honestly suppose he is not interested, still his liability renders him incompetent. He is *prima facie* interested, and the party offering him should have rebutted the legal presumption of interest, either by showing some peculiar provision in the contract of transfer by which he was not to be liable in the event of a failure on the part of Massey to realize the sum due upon the note, or

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that his liability had been released. *Frow & Ferguson v. Downman*, 11 Ala. Rep. 880; *Brown v. Brown*, 5 Ala. Rep. 508. Judgment reversed.

INTENDANT AND COUNCIL OF GREENSBORO' v. MULLINS AND BARFIELD.

1. On the 13th March, 1845, the Intendant and Council of Greensboro' passed an ordinance, authorizing any person who had obtained a license from the county court to retail spirituous liquors in the town of Greensboro', upon paying \$100 and taking out a town license; the penalty for infringing this ordinance was \$20. On the 8th May, 1845, an ordinance was passed, requiring all licensed retailers in the corporation to pay a tax of \$10. The defendants were licensed by the county court, in July, 1844, and August 1845, and in September, 1845, retailed spirituous liquors in the town, without taking out a license under the ordinance of March. In an action to recover the penalty—Held, that the meaning of the two ordinances, taken together, was, that the ordinance of May imposed a tax as an additional charge, without reference to the time when the party was licensed by the county court.

Writ of Error to the Circuit Court of Greene. Before the Hon. J. D. Phelan.

THIS cause was instituted at the instance of the plaintiff in error, by a summons returnable before the intendant of the corporation, requiring the defendant to answer to a charge of retailing spiritous liquors, without a license, in violation of one of the ordinances of the town. Upon the trial, the defendants were fined \$20, and a judgment given accordingly, with costs, by the Intendant. The proceedings were removed by appeal to the circuit court, where judgment was rendered in favor of the defendants, and against the plaintiff, for costs, upon a case agreed by the parties.

W. P. and J. D. WEBB, for the plaintiff in error, cited the act of the 27th January, 1845, amendatory of the several acts incorporating the town of Greensboro'; several ordinances of the town, and the case of the Intendant and Council of the Town of Marion v. Chandler, 6 Ala. R. 899.

J. ERWIN, for defendant in error.

COLLIER, C. J.—By the act of 27th January, 1845, cited for the plaintiff in error, the corporate authorities of the town of Greensboro', are invested with authority to provide for regulating and licensing retailers of spiritous liquors, within the corporate limits of the town, and the exclusive right of granting such license, prescribing the sum to be paid therefor, annulling and prohibiting the same upon good and sufficient complaint being made against any person or persons holding such license, reserving however to the state and county, in all cases where the intendant and council may choose to grant license, the taxes by the laws of the state imposed, to be collected from such retailers as the corporate authorities may think proper to license. The same enactment gives to the intendant jurisdiction to hear and determine all controversies, or matters growing out of the orders, regulations and ordinances of the intendant and council: such as fines, forfeitures, and penalties inflicted, &c.: *Provided*, that in all cases where the amount of the fine, &c., shall exceed two dollars, the party aggrieved may appeal to the circuit court.

On the 13th March, 1845, the intendant and council passed an ordinance, declaring that any person who shall have obtained a license from the county court, may retail spiritous liquors in the town until the first day of January thereafter: *Provided*, he shall pay one hundred dollars, and receive a license from the secretary, under the order of the board. The same ordinance requires a certain oath to be taken, and enacts, that if any person shall retail spiritous liquors in the town, without complying with its requisitions, he shall pay the sum of twenty dollars. to be recovered with costs.

An ordinance was passed on the same day, declaring the

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tax that should be levied on certain objects; and on the 8th May, 1845, this ordinance was so amended, as to require all licensed retailers in the corporation to pay a tax of ten dollars. This tax it was admitted had been paid by the defendants. The defendants had been licensed as retailers by the county court of Greene, in July, 1844, and again in August, 1845—they had retailed spiritous liquors in the town in September of the last named year, without obtaining license as required by the ordinance of March. The question submitted is, whether the payment of the tax under the ordinance of May, and the renewed license by the county court authorized the defendants to retail within the corporate limits of the town?

As a municipal regulation, it is competent for an incorporated town or city, when authorized by its charter, to require one who is licensed to retail spiritous liquors by the county court to purchase from the corporate authorities the privilege of retailing within its limits. 6 Ala. R. 899. The act of January, 1845, in most explicit terms, confers the power to enact the ordinance of March, and it is not denied by the defendants.

It is argued for the plaintiffs, that the ordinance of May, levying a tax of ten dollars on retailers, was intended to apply to such only as had obtained a license from the county court previous to January. The terms of the ordinance do not, we incline to think, sustain this argument; but the fair interpretation of both ordinances, taken together, is, that the one prior in time, required the retailer to obtain a license from the intendant and council, and the latter without reference to the time when he was licensed by the county court, imposed a tax, as an additional charge on his business. These conclusions seem to us altogether clear upon their mere statement.

The plaintiff does not deny, that the license by the county court, in July, 1844, authorized the defendants to retail in the town, while it continued operative. What we have said will indicate, that when that license was renewed, in August 1845, one should have been obtained in the manner the or-

dinance of March prescribes, in order to exempt the defendants from its penalty.

Whether it was competent to impose a tax upon retailers whom the corporation had licensed, it is unnecessary to inquire, for conceding that the ordinance which imposes it is void, it cannot in any manner affect the ordinance which requires a license to be obtained. And upon no principle of construction can it operate as an implied repeal of it. The consequence is, that the judgment of the circuit court is reversed, and the cause remanded.

PARKER AND WIFE v. MCGAHA, ADM'R.

1. A clerk of the circuit or county court, must issue a writ of error on the application of any one against whom a judgment is rendered in his court, make out a complete transcript of the record, and deliver them to the party, his agent, or attorney, and has no right to require his fees to be paid in advance.

MOTION for a mandamus against the clerk of the orphans' court of Coosa county, upon the following facts:

William McGaha, as administrator, had obtained a final judgment in the orphans' court of Coosa, against the applicants; they applied to the clerk for a writ of error to this court, but the clerk declined to issue the writ, or make out and deliver a transcript of the record of the cause, unless the applicants would pay him in advance, or before the delivery of the transcript to applicants. This they declined to do, and the clerk refused to make out the transcript.

MORRIS, for applicants, moved for a mandamus, and cited

Clay's Dig. 306, § 1; 308, § 13; and *McRae v. Juzan*, 4 Ala. Rep. 286.

DARGAN, J.—Previous to the act of 1820, Clay's Dig. 308, all writs of error returnable to the supreme court were issued from this court, or from some one of the judges thereof, directed to the clerks of the circuit or county courts. Upon the service of a writ of error from this court, upon the clerk of the circuit or county court, it became his duty to comply with the mandate of the writ. The court from which it issued, or the judge, was required to take security from the party applying for the writ, that the party should prosecute his writ of error to effect, and answer all damages and costs if the party failed in his plea. It was the duty of the clerks of the circuit and county courts to make out a transcript of the records of the cause sought to be removed to the supreme court, and he could not justify himself in refusing to comply with the writ, because the plaintiff in error had not, or declined paying him for making out the transcript in advance.

By the act of 1820, it was made the duty of the clerks of the circuit courts of this state, on the application of a party against whom a final judgment has been rendered, his agent, or attorney, to issue a writ of error, returnable to the next term of the supreme court; also, to issue citation to the opposite party, which should be served by the proper officer of the court, and which should be returned to the office of the clerk whenever served, and shall, together with a transcript of the cause, be delivered to the party applying, his agent or attorney, to be by him, or her, returned to the supreme court. This statute plainly marks out the duty of a clerk, when application is made to him for a writ of error; but it does not authorize the clerk to demand his fees in advance, before the delivery of the transcript to the party applying for it.

Before the passage of this act, there was no act that authorized the clerk to demand his fees in advance, before making out and delivering the transcript, but it was his duty

to do so in obedience to the writ of error. By law now, on the application of the party, or his attorney, it is the duty of the clerk to issue the writ and citation, to make out a transcript, and deliver them to the party applying; but he is not clothed by this statute with the right to demand his fees in advance, and we cannot invest him with that right. We feel the defect of the law in this particular, and know it must impose on the clerks much labor of a very responsible character, for which, in many instances, they may never get any compensation—yet it is their duty, and consequently they must perform it. The application for the writ of error in this particular case, is to the clerk of the county court; but writs of error lie, from the county to the supreme court, in the same manner, and under the same regulations, that writs of error lie to the supreme court from a circuit court. See Clay's Dig. 297. Under the statutes as they now exist, it is the duty of a clerk of the circuit or county court, to issue a writ of error, on the application of any party against whom a judgment is rendered in said court, and to make out a complete transcript of the record, and deliver them to the party, his agent or attorney, without requiring payment of his fees in advance.

This being the law, and as the facts are agreed on, and are such as would have probably been returned to a rule to show cause, the motion of the applicant is granted, and a mandamus is ordered to be issued.

BULLOCK v. OGBURN, USE, &c.

1. A justice of the peace cannot be permitted to prove the contents of papers, or the proceedings had before him in his office, and which were reduced to writing, without showing first the loss, or destruction of the higher evidence.

2. If a suit be brought in the name of the payee of a note, for the use of one to whom it has been regularly assigned, this is an acknowledgment that the assignee is the proprietor of the paper; and the assignment being shown, the note should be excluded from the jury. So, if the assignment be stricken out pending the suit, the legal title in the note does not re-vest in the payee so as to enable him to maintain the suit.
3. B executes his note to O, in satisfaction of a supposed demand due from the son-in-law of B, to O, when in fact no such demand existed. Held, that the note was without consideration.

Error to the County Court of Shelby.

THIS action was commenced before a justice of the peace on a promissory note made by the plaintiff in error, Leonard Bullock, payable to E. W. Ogburn, for \$46 16, dated 8th October, 1844, and due six months after the date thereof. The suit was brought in the name of the payee for the use of Saunders, but it appeared that the note, previous to the issuance of the warrant, had been indorsed, without recourse by the payee, who was made the nominal plaintiff, to Saunders, for whose use it was brought—a judgment having been rendered for the defendant below, the case was removed by *certiorari* to the county court. Upon the trial in the county court, the assignment by Ogburn was stricken out, and the note offered in evidence. Plaintiff in error proved the existence of the assignment upon the former trial, and objected to the reading of the note as evidence, which motion was overruled. It was further proved by one Wilson, the justice of the peace before whom the trial was had, that a previous suit had been instituted between the same parties to the note. Plaintiff in error then offered to prove, without producing the papers or justice's docket, that said suit was determined in his favor. This proof, at the instance of plaintiff below, the court excluded.

Upon the trial in the county court, it was proved that the note was executed by Bullock in consideration of the satisfaction of a debt claimed to be due to Ogburn, the payee, from one Edward Stanfield, the son-in-law of Bullock, and it was further proved by Stanfield, that no such indebtedness existed at the time. The county court was asked to charge the jury, that if they believed no debt was due at the time of

the execution of the note to Ogburn from Stanfield, they should find for the defendant. The court refused this charge, and instructed the jury that although nothing was due from Stanfield to Ogburn, yet if the note was given in satisfaction of an unliquidated demand, between Ogburn and Stanfield, the failure of consideration as between them, was no defence.

The decisions of the county court, in refusing to exclude the note from the jury, and in refusing to permit the justice to prove the result of the former trial, and also in refusing the charge asked by plaintiff in error, and in the charge given, were excepted to by plaintiff in error, and presented here for revision.

E. E. BRYSON, for plaintiff in error, cited *Rakes, adm'r, v. Pope*, 7 Ala. R. 167; *Kennedy v. Dear*, 6 Por. 90; *Clay's Dig.* 361, § 15; *Young v. Foster*, 7 Por. 420; *Click v. McAfee*, *ib.* 62.

J. T. MORGAN, contra, cited *Sawyer v. Patterson*, 11 Ala. Rep. 525; *Clay's Dig.* 361, § 15; *Pond v. Lockwood*, 8 Ala. Rep. 669.

CHILTON, J.—1. In rejecting the proof of Wilson, the justice, the county court but affirmed the incontestable rule of evidence that the party, who is to prove a fact, must do it by the highest evidence of which the nature of the thing is capable, and which it is in his power to produce. True, justices' courts are not courts of record, yet, a party is not permitted to prove by secondary evidence what appears in writing in their offices, without first laying the predicate by showing the loss, or destruction of the better evidence. In the case of *Kennedy v. Dear*, 9 Por. 90, the court rule, the justice who was offered as a witness, would not be permitted to speak of the papers connected with the suit, unless they were produced.

2. In the admission of the note sued on, after the plaintiff in error had proved the assignment to Saunders, and that it existed at the time of the trial before the justice, the county court mistook the law. In *Hunt, use, &c. v. Stewart*, 7 Ala. R. 525, this court decide, that where a suit is brought in the

name of a payee of a promissory note for the use of a third person, to whom it appears to have been regularly indorsed, the form of the action is an acknowledgement that the indorsee is the proprietor of the paper, and the suit cannot be supported by the payee.

The case at bar, was in this precise category when tried before the justice: Does the fact of the erasure of the indorsement, after the trial of the cause before the justice, and before trial in the county court, alter the case? We are clear, that it does not. The assignee of the note *at the time* of the commencement of the suit, had the *legal interest* in it, as well as the equitable. He alone had the right to sue upon it. The striking out of the assignment, pending the suit, if it had the effect of re-vesting the legal title in the nominal plaintiff, would be but the acquisition of a right to sue after action brought. It is needless to add, that such title cannot sustain the action; therefore, the evidence offered to prove it, should have been excluded. Jones and Parsons's heirs v. Mardis's heirs, 5 Por. 327.

3. It appears that the note was given for a supposed demand, due from the son-in-law of the maker to Ogburn the payee, and that such demand did not in fact exist. The facts disclosed in the bill of exceptions do not show a failure of the consideration, but the total absence of it. The pleas of the defendant, being adapted to the defence, the court should have given to the jury the charge asked for—that if they believed no debt was due from the son-in-law (Stanfield) to Ogburn, at the time of the making of the contract, they should find for the defendant.

For the errors we have noticed, the judgment of the county court is reversed, and the cause remanded.

DILL v. PHILLIPS.

1. When upon an appeal from the judgment of a justice of the peace, the defendant is the appellant, and the amount of the plaintiff's recovery is diminished, though not entirely defeated, the court may render judgment against either party, as justice may require, and this discretion cannot be revised by an appellate court.
2. The plaintiff and defendant being joint owners of a horse, the former sold the horse for a note on M, for \$30, payable to himself, and a mare worth \$70 or \$80. The defendant afterwards purchased the interest of the plaintiff in the mare, and gave his note for the price. M was solvent, and able and willing to pay the note of \$30, which the plaintiff claimed as his own. Held, that in a suit upon this note, the defendant might set off his interest in the \$30 note, if it had not been included in the settlement between the parties.

Writ of Error to the County Court of St. Clair.

THIS was a proceeding instituted before a justice of the peace, on a note for thirty-five dollars, of which the defendant was the maker, and the plaintiff the payee. Judgment was rendered against the defendant for the amount of the note, with interest and costs, and he appealed to the county court, where a verdict was returned for the plaintiff for \$20 35. This sum being in court, and tendered to the plaintiff, was ordered to be paid over to him. The judgment entry also recites, that the amount found due by the verdict was tendered by the defendant to the plaintiff, on the trial before the justice, but was then and still is, refused by him: *Further*, it was tendered to the justice on the day the warrant issued, but after it was served. It is also recited that the defendant offered to pay the costs of the justice. Thereupon it was considered, that the plaintiff recover of the defendant the costs of the trial and proceedings before the justice, and that the defendant recover of the plaintiff the costs of the county court.

A bill of exceptions was sealed at the instance of the plain-

tiff, from which it appears that the plaintiff and defendant were joint proprietors of a horse, on the 21st January, 1845, which the plaintiff sold on that day to H. H. Miller, for a note of thirty dollars, payable to himself individually on the 25th December, 1845, and a mare worth seventy or eighty dollars. On the 1st February, 1845, the defendant went to plaintiff's residence for a settlement of his interest in the mare and note, bought of the plaintiff his interest in the mare, and gave therefor the note declared on. There was some conflict in the evidence as to whether the defendant's note was not given upon the settlement of his interest in the mare and Miller's note. Miller was solvent, able and willing to pay his note; it is still in the plaintiff's possession, who claims it as his exclusive property.

The court charged the jury, that if, at the time the note sued on was made, the defendant's interest in the note on Miller, was not included in the settlement between the parties, then the defendant was entitled to set off his interest in the latter note in the present action, and this although it was not collected.

S. F. RICE, for plaintiff in error.

1. One partner cannot sue his co-partner at law, for the conversion of a portion of the personal property of the partnership; especilly when the portion alledged to be so converted is an uncollected promissory note, taken, and kept, and preserved by one partner for partnership property sold by him. Such action cannot be maintained even after the expiration and dissolution of the partnership, if there has been no settlement or express agreement between the partners. It is only an express promise to pay which will sustain such suit. A conversion is not equivalent to an express promise, nor to a settlement between the partners. To constitute a settlement, all must consent to be bound, or none are bound. *Lamaleve v. Caze*, 1 Wash. C. C. Rep. 435; *Williams v. Henshaw*, 12 Pick. Rep. 378; 3 Harr. & Johns. R. 194; 1 Root, 270; 1 Binn. Rep. 191; 14 Johns. Rep. 318; 2 Penn. 663.

2. The distinction is between the destruction of the property, and the mere conversion of the property, where the

conversion is not a destruction. If the property is destroyed, an action of trover will lie by one partner against the co-partner. But if the property is not destroyed, but merely converted and retained, (as in this case is alledged,) then the action of trover will not lie, nor can assumpsit be maintained. Gow on Part. 113 to 115, marginal pages. 2 Caine's Rep. 167; 3 Johns. R. 178, and cases there referred to in note a; 2 Southard's Rep. 580.

3. The retaining of the promissory note of Miller, is not a conversion. The plaintiff, as a partner, has the right to retain the note. There is no settlement of the partnership debts, and there may be some outstanding. As the proof does not show that there are no partnership debts, there can be no action at law by Phillips against Dill. 4 East, 121, 126, 128; 1 Taunt. 241; 8 Term R. 145.

J. T. MORGAN, for the defendant.

COLLIER, C. J.—It is enacted by a statute of this State, that whenever the defendant shall appeal from the judgment of a justice of the peace, and the appellate court shall render judgment in favor of the plaintiff, for a less sum than that recovered before such justice, it may enter judgment for the costs of the appeal, either against the plaintiff or defendant, according to the justice of the case; but where the plaintiff, or successful party, shall appeal, and shall not recover more than was adjudged by the justice, in that case he shall pay all costs. Clay's Dig. 315, § 16. This enactment is explicit, and authorises the appellate court to render a judgment against either party for costs, as justice may require, where the defendant is the appellant, and the amount of the plaintiff's recovery before the justice is diminished, though not entirely defeated. And this statute applies as well where a judgment is rendered on verdict, as without the intervention of a jury. Here the judgment of the justice was for more than thirty-five dollars, while the judgment of the county court is for some fifteen dollars less. The case is one in which the court might exercise its discretion as to the costs, and we cannot revise its judgment in this particular.

In taking the note of Miller payable to himself alone, and claiming it as his exclusive property, the plaintiff converted to his own use so much of the price of the horse. This being the case, and the ability and readiness of Miller to pay being shown, we can conceive of no objection to the allowance of one half of its amount to the defendant by way of set off. Whether, if the amount sought to be recovered exceeded fifty dollars, so as to have required the suit to be instituted in the county or circuit court, such set off would be admissible, we need not inquire; for however this may be, the enlarged and liberal rules which are recognized on the trial of appeals from justices of the peace, clearly warranted its admission. *Wood v. Wood, et al.* 3 Ala. Rep. 756, is a direct authority to show, that if the defendant was not allowed to recover his interest in the note of Miller, at law, he would be remediless; for the amount in controversy would be too small to induce the interference of equity. The doctrine of an unsettled partnership account cannot be invoked to defeat the defence; and an examination of *Beason v. Riddle*, 11 Ala. Rep. 743, will show that it is wholly inapplicable. Our conclusion is, that the judgment must be affirmed.

SANDERS v. THE BRANCH BANK AT DECATUR.

1. The note of a stranger, received by the plaintiff, in satisfaction of a judgment, will, if paid, be a satisfaction, though it be of less amount than the judgment.

Writ of Error to the Chancery Court of the 30th District of the Northern Chancery Division. Before the Hon. W. W. Mason, Chancellor.

Sanders v. The Branch Bank at Decatur.

JOHN SANDERS filed his bill in the court of chancery, against the Branch of the Bank of the State of Alabama at Decatur, alledging that the bank recovered a judgment at law against him, in the circuit court of Morgan, for \$2,200 debt, \$47 15 interest, and \$110 by way of damages, being five per cent. on the amount of a bill of exchange, on which he was sued as first indorser, which was drawn by Harvy Jemison, on Hugh Maddox & Co. of New Orleans. That he indorsed the bill for the accommodation of Jemison; that execution issued thereon against him, he being the only party sued, which came to the hands of the sheriff; that Jemison, the drawer, paid to the sheriff, Henderson, \$700 on said execution, and took his receipt as sheriff, which receipt is lost, and complainant therefore cannot specifically describe it. That some short time thereafter, Jemison, the drawer, procured one Joseph Jemison to pay, and discharge the balance of the judgment, which was done by Joseph Jemison's paying to the bank \$600 in cash, and giving his note in full for the residue. That notwithstanding said judgment is thus paid in full, the bank has caused execution to be issued on it, and the same levied on the lands of complainant. The bill prays a perpetual injunction of the judgment at law, and general relief.

The bank answered the bill, and admitted the recovery of the judgment on the bill of exchange as stated, and that execution issued thereon, and went into the hands of Samuel Henderson, sheriff, but denied the payment to the said Henderson of the \$700; denied that Joseph Jemison paid, and discharged the residue of the judgment; but admitted that Harvy Jemison, the drawer of the bill, had a note discounted in the bank, and on the 19th February, 1840, checked in favor of said judgment \$1,043 40, and at the same time the further sum of \$601 71; also that he paid George W. Rice's check for \$500, on account of said judgment. The answer then sets forth a calculation of interest, and the amounts paid, and claims as yet due for principal \$274 22, \$100 damages on the bill, and cost. George W. Rice was examined on the part of the complainant, who states, that the judgment was paid off in part, by Harvy Jemison to the sheriff of Lawrence county, and the balance was paid into bank by Joseph

Jemison, by substituting his note, for an amount equal to the balance of the judgment. That when Joseph Jemison was settling the judgment with the bank, he tendered the receipt of Henderson, the sheriff, for seven, or eight hundred dollars, given to Harvy Jemison, the drawer of the bill, for money paid on the execution upon the judgment referred to. The bank took the receipt, and put it into the hands of an attorney to proceed against the sheriff; afterwards, that the sheriff paid into bank \$500, and alledged that \$200 had been retained by him, and applied to other executions, then in his hands against Jemison, the drawer of the bill. This witness states, that the true amount due on said judgment, is the amount due on the sheriff's receipt. Joseph Jemison deposed, that he applied to the bank, in consequence of an agreement between Harvy Jemison and himself, to settle the debt. That he proposed to the bank, if they would receive the sheriff's receipt for \$700 on this judgment, which he then had, that he would settle the balance by notes he held, and by his own note. This was agreed to, and he gave up the receipt to the bank, which was allowed as a credit, and that he settled the balance by his own note, and a note he held on one Harris, which notes have been paid. He states that he was informed, there were no damages, as they had been released by an act of the legislature, but that his settlement was in full of said debt. The statement of the clerk was taken, who made out an account, showing a balance due the bank on the bill of \$274 22; this account was taken from the books of the bank.

Henderson, the sheriff, was examined, who states, that before the execution came into his hands, Harvy Jemison proposed to pay to him \$700 on this debt. That he informed him he had no authority to receive it, but that he would do so, and apply some of it to other executions he had against him at the time, and the residue he would apply to the debt now in controversy. That Harvy Jemison at first objected to the application of any part of it to any other debt, than the bill of exchange, but finally consented, that he might satisfy other executions, and apply the balance to this debt. That he paid Rice, the bank attorney, \$500 of this sum, and

retained \$200 to pay costs, commissions, and the other executions he held against Harvy Jemison.

The deposition of Harvy Jemison was taken, but this was suppressed by the chancellor, on the ground of interest.

The case was heard, on bills, answer and proof, and the chancellor enjoined the collection of all the judgment, except \$384 22, which he considered as still due, and dissolved the injunction as to this sum. This decree is assigned for error.

PETERS and L. P. WALKER, for plaintiff in error.

DARGAN, J.—The only question in this cause is, whether the judgment at law has been paid and satisfied. Rice, who was the bank attorney, states, that Joseph Jemison gave his own notes, in full of the judgment, less \$700, that had been paid to Henderson the sheriff, and that he handed over to the bank the receipt of the sheriff for this sum, as received on this judgment for the bank. Joseph Jemison, in clear and distinct terms, states, that he agreed with the bank, to to give a note he held on one Harris, and his own note, for the residue of the judgment, deducting seven hundred dollars the amount of the sheriff's receipt, which he then handed over. That there was a small balance coming to him, from the proceeds of Harris's note, and his own, which the bank paid him. The sheriff, Henderson, admits that he received \$700, but says, that it was agreed between Harvy Jemison and himself, that he should retain enough out of this sum to pay some other executions in his hands, and also the cost and commissions in this case—but at the time he received it, he had no execution on the judgment at law; but he does not state, that he gave Harvy Jemison a receipt for this sum.

It is very certain, from the testimony of Rice, and Joseph Jemison, that Henderson gave a receipt for \$700, as paid on this case, which receipt was handed over to the bank, and accepted by it. We believe the contract between Joseph Jemison and the bank was, that the bank would accept the receipt of Henderson for \$700, and his notes for the residue, in full satisfaction and discharge of the judgment. Joseph

Jemison was not the debtor, nor liable in any way to the bank, and even if the bank had agreed to accept his notes for a less amount than the judgment at law, nevertheless it would have discharged the judgment. As these terms were accepted, and the notes of Joseph Jemison substituted for the residue of the judgment, have been paid, this is a satisfaction of the judgment at law.

The decree of the chancellor is therefore reversed, and a decree will be here rendered, perpetually enjoining the judgment at law, and the plaintiffs in error will recover of the defendants their cost in this case, and the cost in the court below.

ROUNDTREE v. HOLLOWAY.

1. If the sheriff discharge an execution, by paying the amount to the plaintiff, the defendant is liable to the sheriff in assumpsit, if he authorized the sheriff to make the payment, or assents to, and adopts it after it is made. A motion by the defendant to quash an *alias* execution, on the ground of such payment by the sheriff, is such a ratification and adoption of the act of the sheriff, as will make the defendant responsible to him for the amount.

Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

ACTION of assumpsit by the defendant in error against the plaintiff. The declaration contains the common counts. Pleas in short: 1. Non-assumpsit. 2. That the demand sued for is an open account, and the same is barred by the statute of limitations of three years. That the money sued for by the plaintiff, was paid by plaintiff as sheriff of Dallas county, on an execution against defendant, and without his consent. 4. Set off. The plaintiff took issue on the first,

second, and fourth pleas, and demurred to the third. The demurrer being overruled, he replied, "that the defendant afterwards recognized, and adopted, and assented to said payment, by moving to quash, and thereby became liable and promised to pay plaintiff." To which replication there was a demurrer, which was by the court overruled. Judgment for the plaintiff below on verdict. The judgment on the demurrer to the replication to the third plea is assigned in this court as error.

G. W. GAYLE, for plaintiff in error.

1. *Indebitatus assumpsit* cannot be maintained for money paid out and expended, without proof that it was at the request of defendant. *See *Weakly v. Brahan & Atwood*, 2 Stew. 500; *Menderbrack v. Hopkins*, 8 J. R. 436; *Beach v. Vanderburg*, 10 J. R. 360.

2. The replication, if stricken out, would contain the petition for *supersedeas*, and the facts upon which the *supersedeas* and motion to quash was founded; because a motion to quash may be made for many reasons not connecting the plaintiff with the case at all, as that defendant paid the money himself, or was a certified bankrupt, &c. The petition therefore, shows that Roundtree paid the money himself. If the replication shows this, it is bad, because it shows a state of facts which do not authorize Holloway to recover in law, equity, or common honesty.

3. If the replication is not construed to confess, avoid, or deny the plea, then it is bad. See *Mason v. Craig, et al.*, 3 Stew. & P. 389.

4. If the replication is a nullity, the court erred in submitting the case to a jury. See *Wheelock v. Fitch*, 3 Por. 287; 2 Stew. 433.

LAPSLEY, for defendant.

CHILTON, J.—It was left by this court, in *Rutland's Adm'r v. Pippin, et al.* 7 Ala. Rep. 419, an open question whether, if the sheriff paid the money demanded by an execution in his hands to be levied, at the request of the defendant in the execution, he could maintain an action against

the party so making the request, for money had and received; or whether, if the defendant to the *fi. fa.* availed himself of the payment so made, upon a motion to quash the execution, and thus obtaining the benefit of it, he would be liable upon the presumption of a previous request, or subsequent adoption of such payment; and in the subsequent case of Roundtree v. Weaver, 8 Ala. Rep. 314, the court say, "if the defendant approves the payment by moving to quash, we cannot very well perceive how he can avoid a recovery in an action by the sheriff for his reimbursement. It is certainly true, that one man cannot make another his debtor without his consent, but if he pays money for which another is liable, and it is insisted upon by the latter as an extinguishment of such liability, and the same is so treated, this is an adoption of the payment, and is as effectual to charge him, as though the payment had been made at his special instance.

The third plea avers, that the money was paid by the plaintiff below, as sheriff of Dallas county, on an execution against the defendant, and without his consent. The answer of the plaintiff is, "after the payment was so made, the defendant recognized, adopted, and assented to said payment by moving to quash, and thereby became liable, and promised to pay plaintiff." These pleadings, by the courtesy which is so liberally extended usually at the bar, are in short. We must then, in accordance with the former decisions of this court, consider them as drawn out in proper form, but as containing the substance only of what is stated in short.

Applying this rule, we think the above plea is good. Its evident meaning is, that the defendant below availed himself of the payment made by the sheriff in quashing the execution, and thereby recognized, adopted, and assented to the payment. This is the only reasonable construction which it will bear, when considered in reference to the plea which it follows, and purports to answer. The plea need not set out the petition for the supersedeas. It is sufficient that the plaintiff should aver, that the defendant below adopted and sanctioned the payment of the money, by insisting upon it as a satisfaction of the execution, and by

procuring the quashal of the execution by virtue of such payment. Or if he had copied the petition in his plea, and set out the entry of satisfaction, which we may infer was made thereon by the court, he would not have been estopped from showing that his money, instead of the funds of the defendant in the execution, had been appropriated to its payment. The plaintiff below was neither party or privy to the record, and was not therefore estopped by it. Besides, the court is not bound, in quashing the execution, to look alone to the grounds stated in the petition for supersedeas, but may show any other cause for quashing it which would be legal. The petition to supersede merely has the effect to suspend the execution, if the same is allowed and bond given; and although it may be pleaded to, if the parties choose thus to make up an issue, or, though it may be dismissed, still the party would have a right to make his motion to quash the execution. We think the replication to the third plea substantially good, and the demurrer to it properly overruled.

Let the judgment be affirmed.

ELMORE & WILLIS v. HARRIS.

1. A purchaser who has made full payment, entered into and retained the possession of land, but who has no other evidence of title, than a bond conditioned to make him a conveyance in due form, has not such a title as can be sold under execution at law. Nor will the purchaser at the sale, with the sheriff's deed, acquire such a title that he can maintain an action at law to recover the possession.

Error to the Circuit Court of Macon. Before the Hon. G. W. Stone.

TRESPASS to try title, by the plaintiffs in error. The title of the plaintiff was derived from a purchase made at sheriff's sale of the land in controversy, under execution against the defendant, and the deed of the sheriff to him for the land. The defence was, that the defendant had but an equitable title, having no other title than a bond with condition to make him a conveyance. It was proved that he had paid the purchase money, and was in possession. The court held, this was not such a title as could be sold by execution at law; to which the plaintiff excepted. This is the matter now assigned as error.

J. A. ELMORE, for plaintiffs in error.

1. The interest of Harris, in 1841, was such that the judgment bound it, and by the sale was transferred to plaintiffs. This was an equity, or "use, within the provision of the statute of uses," which was in England also a statute against frauds. Clay's Dig. 156, § 35; Jackson v. Parker, 9 Cow. 73, 81; Land v. Hopkins, 7 Ala. 114, 119; Bogart v. Perry, 17 Johns. 351; Ib. 1 Johns. Ch. 52.

2. No deed is necessary to pass title. The deed is evidence of what has taken place between the parties. The title passed by the contract of sale, and the execution of the contract, and this was coupled with possession for years, and improvements. Bullock v. Wilson, 2 Porter, 436; Goodlet v. Smithson, 5 Porter, 245; Jones, &c. v. Inge, &c. Ib. 327; Fipps v. McGehee, Ib. 413.

3. The facts of this case differ from the one in 5 Ala. R. There the father had neither legal title, use, or possession in his own right. Here the husband has unbroken possession, and the entire use or equity in his own right, and the naked legal title in Dent, his vendor. Doe ex dem. &c. v. McKinney, 5 Ala. 728.

4. If the statute were silent as to what estates could be sold under execution, the law would determine that only legal interests, or such as would be protected or enforced by courts of law.

BELSER, for defendant in error.

1. The plaintiffs in the case must recover on the strength of their own title, and if the defendant in execution had no such title in the premises, at the time of sale, as could be reached by execution, of course they take nothing by their purchase. *Brock v. Young*, 4 Ala. 584.

2. Harris, the defendant, had no such title as could be sold under execution, even if all the purchase money was paid, unless the bond from Dent had been given up, and a deed executed. *Clay's Dig.* 350, § 31; *Davis v. McKinney*, 5 Ala. 729; *Doe ex dem. &c. v. Mitchell*, 6 Ib. 71; *Jack v. Morse*, 16 John. 196; *Tallot v. Chamberlaine*, 3 Paige, 220; 1 Rev. Stat. of New York, 744, § 4; *Clay's Dig.* 216, § 76.

3. The bond for titles executed by Dent to Harris is but a covenant to convey at some future time, it does not create a seizin in the obligee, nor does it amount to a conveyance. By a mere bond for titles, uses are not raised so as to be executed by the statute, but by a conveyance; for there must be a seizin to raise them, which a covenant does not give. *Clay's Dig.* 156, § 35; 4 *Kent's Com.* 496, note; *Shute v. Hardin*, 1 Yerger, 10, 11; *Buford v. Buford*, 1 Bibb, 306; *Land v. Hopkins*, 7 Ala. 118-9; *Childs v. Derrick*, 1 Yerger, 79.

4. The cases in New York and Mississippi are founded on particular statutes of those states, not in force here. *Bogart v. Perry*, 17 John. 354; *Thompson v. Wheatly*, 7 Smede & M. 505; *Ib.* 744.

COLLIER, C. J.—The questions in this cause are—1. Has the purchaser of land, who has made full payment for it, entered into and retained the possession, but who has no other evidence of title than a bond conditioned to make him a conveyance in due form, such an estate as may be sold under a *fieri facias*? 2. Where land is sold under a *fieri facias* against the husband, and an action is brought against him by the purchaser, is it allowable to permit the trustee of the wife to defend with, or instead of, the husband, unless he shows *prima facie* that he has a title, as trustee, superior to and independent of that which was sold under the *fi. fa.*?

1. In *Doe ex dem. Davis v. McKinney and McKinney*, the question whether an equitable interest in lands could be sold under execution, was directly presented, and we there considered the effect of the acts of 1812 and 1820. The first statute makes lands subject to the payment of judgments and decrees, and clerks are required to frame the executions accordingly: *Further*, "the sheriff or other officer selling any real estate, shall make a title to the purchaser, which title shall vest in the purchaser all the right, title and interest which the defendant had in and to such real estate, either in law or equity." This enactment we said was restricted in its operation by that of 1820, which provides that "no other than the legal to land or other real estate, shall hereafter be sold or conveyed by virtue of any execution." *Also*, that "the equitable title or claim to land, or other real estate, shall hereafter be liable to the payment of debts, by suit in chancery, and not otherwise; and when a bill shall be filed for that purpose, all persons concerned in interest shall be made parties thereto." We were inclined to think, that under the first statute it would have been no objection to the sale of lands under execution, that the defendant had only an equitable title; but were of opinion it had been repealed in part by the later act. This we said was "explicit in its terms, and does not leave the intention of the legislature to be ascertained by construction. It inhibits the sale of an equitable title under execution, and refers the creditor to chancery for an authority to sell it. The occupant of land with such a title, we think, cannot be regarded as having a distinct and independent possession, which may be levied on, but his possession is so intimately connected with the title, that it cannot be sold under execution, so as to transfer an interest to the purchaser." The case cited was elaborately considered, not only with a reference to all our previous adjudications on the question, but also to the decisions from New York; and we have ever since adhered to it as a satisfactory exposition of the law. See also *Whiteside, et al. v. The Branch Bank at Decatur*, 10 Ala. Rep. 249.

It has been also held, that the mere occupation or possession of land which cannot ripen into a legal estate, is not such an interest as can be sold under execution. *Rhea, Con-*

ner & Co. v. Hughes, 1 Ala. Rep. N. S. 219. In *Doe ex dem. Heydenfeldt v. Mitchell*, 6 Ala. R. 70, it was shown that the defendant had been in possession of land for several years, built a house, and made other valuable improvements thereon, and we decided that the inference was, that his occupancy was legal, and his estate such as might be sold under execution; if this inference was unauthorized, it devolved on the defendant to show it. These cases are entirely reconcilable with each other, and are all well supported by authority.

It is enacted by statute in Mississippi; that "estates of every kind holden or possessed in trust, shall be subject to like debts and charges of the persons to whose use, or to whose benefit they were, or shall be respectively holden or possessed, as they would have been subject to, if those persons had owned the like interest in the things holden or possessed, as they own, or shall own, in the uses and trusts thereof." Again, "when the sheriff shall sell lands and tenements, it shall be his duty to make such deeds as may be necessary to vest in the purchaser the right, title, interest, claim, and demand of the debtor, or defendant, either in law or equity." Under these enactments it has been decided, that where a person has a bond in which the obligor stipulates to make him a title bond, on payment of the purchase money, when he pays the purchase money, he acquires such an estate in the land as may be sold under execution; and the purchaser at sheriff's sale of land thus situated, acquires the same equitable interest in the land, which the judgment debtor had; but the legal title being outstanding, he cannot maintain ejectment to recover the possession—he must come into equity to enforce his right. *Thompson v. Wheatley*, 5 S. & Mar. Rep. 499. In *Goodwin v. Anderson, et al.* Id. 730, it was determined that the vendee of real estate who has only a bond for title, when the purchase money is paid, and who has paid but part of the purchase money, has not such an interest as is subject to seizure and sale under an execution at law. It is made a question whether a purchaser of land under execution against the vendee thereof, who has only a bond for title, when the purchase money is paid, is entitled

to be substituted to the place of the judgment creditor to the extent of his bid at the sale under execution. See 5 Har. & Johns. R. 164; 8 East's Rep. 481; 5 Bos. & Pul. R. 461; 7 Smedes & Mar. Rep. 15, 630; 1 Yerg. Rep. 3, 79; 13 Pet. Rep. 298; 4 McC. Rep. 340; 1 Dev. & Bat. Rep. 52; 4 Dev. Rep. 174; 3 Cow. Rep. 81; 19 Wend. Rep. 414; 8 Ohio Rep. 21; 2 N. Hamp. Rep. 16; 9 Wend. Rep. 20; Conn. Rep. 226; 2 Leigh's Rep. 280; 4 Smedes & Mar. Rep. 163. It is the result of our decisions, as well as several of the citations we have made; especially the cases from the Mississippi reports, that the defendant had no such estate in the premises in question as could be sold under execution; and that the plaintiff did not acquire a title by his purchase and the sheriff's deed, on which he could maintain an action at law, to recover the possession.

2. The conclusion attained upon the first point relieves us from the necessity of giving to the second an extended examination. We have heretofore elaborately considered the right of a party claiming an interest in lands sought to be recovered by action, to be let in to defend his title, and the character of the defence he is permitted to interpose. In the present case, it is not possible that the plaintiffs have been prejudiced by the order permitting Forest to be made a party to the record, that he might assert the rights of his *cestui que trust*, Mrs. Harris; for we have seen that the plaintiff had no legal title, and could not recover, irrespective of the claim set up by the intervening defendant. *Doe ex dem. Davis v. McKinney and McKinney, ut supra; Thompson v. Ives*, 11 Ala. Rep. 239. These cases are so direct and full, that we need add nothing more. The judgment of the circuit court is consequently affirmed.

SAMUELS v. AINSWORTH.

1. Money lost upon a horse race, may be recovered back, if the suit is brought within six months from the time the money is paid to the winner. It is not necessary the defendant should plead that more than six months has elapsed before the commencement of the suit, as the right of action depends on the suit being brought within that period.

Error to the Circuit Court of Benton. Before the Hon. G. W. Lane.

THE plaintiff declared in assumpsit, against the defendant, and a trial was had in the court below on the plea of non-assumpsit. In the progress of the trial, a bill of exceptions was sealed by the presiding judge, which presents the following facts: In the month of November, 1843, the plaintiff, and defendant, bet a hundred dollars on a horse race, and each staked the money in the hands of a third person. The race was run in Benton county, and the defendant won the race. The stakeholder, without notice from the plaintiff, paid it over to the defendant. It was also proved, that the defendant was a non-resident of the State of Alabama, and was out of the State, from the time he won the money, until a week before the commencement of this suit. On this evidence, the court charged the jury, that money lost on a horse race, and paid over without notice to the stakeholder, could not be recovered back by law; also, that if they believed the evidence, the plaintiff could not recover. Under this charge, the jury returned a verdict for the defendant, and judgment was thereon rendered. It is here assigned for error, that the court erred in the charges given to the jury.

S. F. RICE, for plaintiff in error.

1. The several statutes upon the subject of gaming are to be construed together—being *in pari materia*. Horse racing is one species of gaming. And money lost upon a horse

race, and paid over to the winner, may be recovered back by the loser, under our statutes. Clay's Dig. 257, § 1; Ib. 434, § 17, 18; Ivey v. Phifer, 11 Ala. Rep. 538.

2. If it were even doubtful, whether a bet on a horse race, is within the letter of the 17th and 18th sections of the 6th chapter of the penal code, there can be no doubt but that it is within the mischief intended to be remedied, and within the equity and spirit of those sections. Every species of gaming is unlawful. Lethbridge v. Chapman, 15 Vin. Abr. 103; Hickman v. Walker, Willes R. 27; Wilcocks v. Huggins, 2 Str. 907.

3. The limitation of six months provided in the 17th section above cited, was not pleaded. But if it had been, the proof that defendant was out of this State from the time of payment until about a week before this suit was commenced, would have been an avoidance of the limitation. Clay's Dig. 327, § 84.

A. J. WALKER, contra.

At common law, no action could be maintained to recover back money lost on a wager, and if a wager deposited in the hands of a stakeholder be paid to the winner without notice to retain it by the loser, he is without remedy. This rule is uninfluenced by our statute of 1807. Clay's Dig. 257, § 1; Tindall v. Childress & May, 2 St. & P. 250; Wood v. Duncan, 9 Porter, 227; Windham, use, &c. v. Childress & Skanes, 7 Ala. R. 357.

The parties here are in *pari delicto*, and the illegal contract that the winner should receive the money bet has been executed. Under such circumstances, no court will interfere between the parties. Black & Manning v. Oliver, 1 Ala. R. 449.

The act of 1841, (Clay's Dig. 434, § 17,) refers alone to gaming, and cannot be construed to include horse racing, for the following reasons:

1. A proper definition of gaming, according to dictionaries of recognized authority, and the ordinary acceptation of the term, does not include horse racing.

2. Because the above cited act is an innovation upon the common law, and must be strictly construed.

3. The act of 1841 is to be construed in reference to the previous act of 1807. In the latter, both the terms horse racing and gaming are used. Why, in the subsequent act of 1841, is the term horse racing left out, if the legislature did not intend thus tacitly to exclude horse racing from the provisions of that act, for its supposed encouragement to the rearing of superior horses.

DARGAN, J.—At common law, money lost on a horse race, could not be recovered back of the winner, by the loser. *Childress v. May*, 2 Stew. & Por. 250; 9 Porter, 227; 7 Ala. R. 357.

Our statute, passed 1807, (Clay's Dig. 257,) makes void all provisions, agreements, bonds, bills, notes, or other contracts, judgments, mortgages, &c. where the whole, or any part of the consideration of such bond, bill, note, &c. shall be for money, or other valuable thing, laid, or bet, at cards, dice, or at any other gaming table, called A, B, C, or E, O, or billiards, or at any other table, known, and distinguished by any other letters, or figures; or rowly powly, *rouge* and *noir*, or at any faro bank, or table, by any other name; or at any horse race, cock fighting, or other sport or pastime. Under this statute, it is very clear that no contract, the consideration of which was founded in whole, or in part, upon any gaming consideration, could be enforced by law, yet notwithstanding this statute, if the loser had paid over the money, to the winner, he could not have recovered it back, for both parties were considered *in pari delicto*, and the law would not interfere between them. The plaintiff, then, neither at the common law, nor under this statute, could have maintained this action, to recover back the money he had lost, and paid over. See 7 Ala. Rep. 357; 1 Ala. Rep. 449; 9 Porter, 227.

But the plaintiff contends, that by the penal code, (Clay's Dig. 434, § 17,) he is entitled to recover. This section enacts, that if any person, shall by playing at cards, or any other game, or by betting on the sides, or hands, of such as are gaming, shall lose to any person, any money, or other goods, and shall pay, or deliver any part thereof to the winner, the person so losing; or paying the same, may sue for

and recover such money, in an action for money had and received; and such goods, in an action of trover, or detinue, &c.; provided, however, neither of the aforesaid actions shall be maintained by the loser, unless such action be brought, within six months from the time of the payment, or the delivery of the goods. And the plaintiff contends, that although horse racing is not expressly named in this statute, yet by a proper construction of this act, taken in *pari materia*, with the act of 1807, it is embraced; and the true meaning of this act, is, to embrace all species of gaming named in the act of 1807. That under this act, any money, or other valuable thing, lost at any game, or on a horse race, &c. may be recovered back. We are disposed to yield our assent to this construction, and to hold, that money lost, and paid over, on a horse race, or other pastime, by virtue of this section of the penal code, may be recovered back by the owner. But the right to recover it back, is given by statute; and must be asserted in the mode prescribed by the statute, and when we look to the proviso, we see, that the suit to recover back, must be brought within six months. The language is, "provided, however, that neither of the aforesaid actions shall be maintained by the loser of such money, or goods, unless the same be brought within six months from the time of payment, or delivery of such goods.

Now let us look at the law before the passage of this act. Neither under the common law, nor the act of 1807, could this plaintiff recover; by the penal code he may, provided, he sue within six months. That the suit be brought within six months, is a requisite to maintain this action, and if the loser let the six months expire, without suit, he then can claim only such rights as he could have claimed, under the act of 1807, or the common law; neither of which will permit a recovery of money lost, and paid over to the winner.

We cannot assent to the argument, that the six months named in this statute, is in the nature of the statute of limitations, which merely takes away the remedy; but are fully satisfied, that the right to recover, or the right of action, depends on suit being brought within six months. Therefore, it is unnecessary to plead specially, that the suit was not brought within six months.

As the evidence clearly showed, that the suit was not brought within six months from the time the money was paid over, the court did not err in the charge, that under the evidence, the plaintiff could not recover. Had there been the slightest conflict of proof, or even a controversy in the court below on this question, this charge would have been objectionable; but as the plaintiff's evidence showed this, and there was no controversy, as to this fact, the charge is not erroneous. The charge given, that money lost on a horse race and paid over, could not be recovered back, was erroneous, if the court intended to lay this down as a general rule. But whether the presiding judge intended to convey this idea to the jury or not, *is immaterial*; for if he did, it would be merely an error without injury, and for which this court would not reverse, as the whole evidence clearly showed that the plaintiff could not recover, and the jury were so charged.

The judgment is consequently affirmed.

BROCK v. HEADEN.

1. To authorize the reading of a deed of trust in evidence, the execution of the deed must be proved, though it is recorded.
2. To authorize the registration of a deed of trust, the certificate of the probate should show, that it was executed on the day and year mentioned in the deed, and that the witnesses subscribed it in the presence of the maker of the deed, and in the presence of each other.
3. A provision in a deed of trust, that the trustee may wait until required by the *cestui que trust* to sell, does not have the effect to postpone the law day of the deed, the trustee being authorized to sell upon default of payment of the debt secured, nor is it a circumstance from which fraud can be inferred, that the trustee is invested with a discretion, as to the manner of selling.
4. When a deed is not read as a recorded instrument, it is not an error prejudicial to the party against whom it is offered, that the clerk is permitted

to prove, that the deed was proved before him, as stated in his certificate; though such proof might be improper, unless the certificate was attacked for fraud, or a clerical mistake attempted to be shown.

5. A demand before action brought, is not necessary, unless a demand is necessary to render the detention unlawful.

6. A sale of goods enclosed in boxes, and not exposed to view, is evidence of fraud; yet it cannot have the effect to render the deed of trust void, if *bona fide* in its creation. *Quere*—If the goods were of value sufficient to satisfy the demand of the creditor who caused the sale to be made, and there was no other demand to be satisfied out of the assigned effects, whether a court of law could declare the deed inoperative by reason of such sale?

7. After the law day has passed, if the demand secured by the deed has not been satisfied, the trustee may recover by suit the property conveyed by the deed, which has not been disposed of according to the requisitions of the trust, without being required, in a proceeding at law, to account for the property sold, or for that which remains. If the deed is satisfied, it devolves on the other party to show it.

8. When a demand is proved to be extinguished, it is not necessary to produce the note which was the evidence of it.

Error to the Circuit Court of Benton. Before the Hon. G. W. Lane.

THE defendant in error, who was the plaintiff below, sued Brock in an action of detinue, to recover a carryall and horse, alledged to have been unlawfully detained from him.

The declaration contains two counts—the first an ordinary count upon a bailment; the second count avers, “that the defendant, on the day and year aforesaid, &c., was indebted to the said plaintiff in the sum of two hundred and twenty-five dollars, for goods, wares and merchandize, sold and delivered by the plaintiff to the defendant, at his request, to wit, for a certain carryall and horse, to be paid for by the said defendant, when he should be thereunto thereafter requested, whereby, and by reason of said last named sum of money being and remaining wholly unpaid, an action hath accrued to said plaintiff, to have and demand said last mentioned sum, &c. The defendant, Brock, demurred to each of the two counts separately, and to the whole declaration. The court overruled the demurrer, and thereupon the

defendant pleaded to the first count, *non detinet*, and to the second count, *nil debet*. Verdict and judgment for the plaintiff for the property, or its alternate value.

On the trial, a bill of exceptions was sealed, presenting the following facts: The plaintiff below claimed the property by virtue of a deed of trust executed to him as trustee for for the use of Hudson & Brockman, creditors of the maker, by one John H. Remly, dated the 23d February, 1839, by which the property sued for, with land and other articles, is conveyed to said trustee, to secure a debt of \$550, due Hudson & Brockman, the 25th December, 1839. The deed provides, that unless Remly shall pay said debt, and the expenses of the deed, by the time the debt falls due, or as soon thereafter as requested by the said *cestui que trusts*, then upon the requisition of the said beneficiaries, the said trustee is required to sell the said property, at such time as he may deem most likely to promote the interest of the parties concerned, and out of the proceeds to pay said Hudson & Brockman their debt, and the remainder, if any, to be paid to said Remly. This deed was admitted to record upon the following certificate: "State of Alabama, Benton county. Before me, M. M. Houston, clerk of the county court for said county, came John Moore, one of the subscribing witnesses to the foregoing deed of trust, who, after being duly sworn, deposeth and saith, that he signed the same as a witness, in the presence of James Nesbit, the other subscribing witness, and that he saw the said John H. Remly, the grantor, sign, seal and deliver the same to James N. Haden, the trustee, on the day the same bears date, and for the purposes therein mentioned. Given under my hand at office, the 28th February, 1839. Signed,

Recorded 28th Feb'y, 1839. M. M. HOUSTON, Cl'k."

The defendant objected to the introduction of this deed, on the following grounds: 1. Because it was not sufficiently proved. 2. Because he contended it was fraudulent on its face. The court sustained the first objection, and referred the *bona fides* of the deed to the jury, deciding that it was not void on its face. The plaintiff then proved its execution, and read it to the jury, as also the certificate of its probate, which was shown by the evidence of Houston to

have been made on the day it bears date. The evidence conduced to show, that the defendant below, in 1840 or '41, had purchased the property sued for of Remly, the grantor in the deed of trust. That he had no knowledge of the existence of the deed. That the horse was drowned soon after he purchased him, and that he had left the carryall in the State of Georgia, with his sister, some five or six years previous to the institution of the suit.

The defendant proved a declaration made by Hudson, one of the beneficiaries in the deed, that the sale of the trust property, made for his benefit, amounted to over \$200, but that a considerable portion of the debt secured to be paid by said deed, remained unpaid. No other proof of indebtedness was shown, and the note described in the deed was not produced. A witness also testified, that at the request of said Hudson, he had sold some of the property named in the deed, consisting of boxes nailed up, and which were sold without being opened; the goods contained in them, not being shown. These sales were made by a person other than the trustee, and amounted to \$20 or \$23.

The court was asked to charge the jury—1. That the above named mode of disposing of the property was evidence of fraud in the execution of the trust, but the trustee not being a party to the sale, the court refused the charge.

2. The court was asked to charge, that the plaintiff, in order to recover, must account for the value of the property, or the property itself, which was not shown to have been disposed of. This charge was also refused.

3. Further—That the plaintiff could not recover unless he showed the proceeds of the sales made under the deed, had been applied towards the payment of the demand secured by it, which was likewise refused.

4. Also—That the deed was fraudulent on its face, because there was no time specified in it when the trustee was to sell, and because it did not provide whether the sale to be made under it, should be made publicly or privately, and upon what notice. This charge being also refused, the court charged the jury, that to entitle the plaintiff to recover, the jury must be satisfied by proof that the deed was actually executed by Remly, for the security of a debt due from him to

Hudson & Brockman, subsisting at the time of its execution, and that said debt, or a part of it, was still unpaid. That Remly owned the property sued for at the date of the deed ; that it was in defendant's possession at the commencement of the suit, was the same conveyed in the deed, that plaintiff had demanded them before suit brought, and if it be shown that defendant had purchased the property, then they must further find that they had knowledge of the existence of the deed before he made such purchase. That the statement made by Hudson, as called out by the defendant, might be regarded as evidence of a subsisting demand. Also, that although plaintiff must prove the debt due which the deed secures, yet if he have proved it once existed, its continuance would be presumed, until defendant should prove its payment. Further, that if the property had been shown to have been in possession of the defendant, the law presumed it so continued until the contrary was shown. The defendant excepted to the various decisions of the court, and now assigns as error—

1. That the court permitted the trust deed to be read in evidence.

2. In permitting the evidence objected to as shown by the bill of exceptions.

3. In refusing to give the charges prayed for by the defendant, and in the charges given ; and

4. In overruling the demurrer to the declaration.

WOODWARD & MORGAN, for plaintiff in error.

Where a count in detinue is on a special bailment, the particular bailment need not be proved, but some bailment must be proved. The proof in this case does not show a bailment; the charge of the court, therefore, which assumed that the plaintiff was entitled to recover upon the state of facts attempted to be made out by plaintiff under the bailment count was erroneous. 1 Saund. on Plead. and Ev. 433 ; 2 Steph. N. P. 1312. The proof, as appears from bill of exceptions, would not sustain the count in debt. 2 Chit. Pl. 594, note.

The deed ought not to have been admitted on proof of its execution merely, but it should have been shown that it was executed at the time when it purported by its date to be ex-

ecuted, before it could be read to the jury. 5 Ala. R. 300; 8 Id. 363.

The declarations of Hudson respecting the consideration, as proven by witness, Allen, were incompetent; the note was the best evidence, and should have been produced.

The case of *Graham v. Lockhart*, 8 Ala. Rep. 9, is unlike this; in that case the deed was for the protection of securities of the debtor, who of course had no control of the notes in possession of payee. This deed was for the benefit of Hudson, the creditor, and his interest in the deed was such, that trustee should have produced the note. Selling goods at the instance of Hudson, beneficiary of the deed, boxed up without exhibition of them, was a circumstance well calculated to excite suspicion of fraud, and the court should have given the charge asked with respect to that portion of Allen's evidence.

The court erred in charging the jury, that if there was proof that defendant was ever in possession, the presumption was that he continued in possession until suit brought, unless proved that it went out of his possession. There being proof that the horse was drowned shortly after defendant purchased, defendant was certainly not liable for him, and the above charge was calculated to mislead. Plaintiff must show actual possession in defendant at the time of bringing suit.

S. F. RICE, for defendant.

CHILTON, J.—1. The circuit court did not err in permitting the trust deed to be read in evidence to the jury. It was not read upon the certificate of registration. This would not be proper in any case, as our statute authorizing deeds properly recorded to be evidence without further proof of execution, applies to absolute deeds, and not conveyances of this description. *Bradford v. Dawson & Campbell*, 2 Ala. Rep. 203; *Desha & Sheppard v. Scales*, 6 Ala. Rep. 356.

The certificate of the probate of the deed is not in conformity to the statute. Clay's Dig. 152, § 7. This requires that the witness should swear to the subscription of the party executing it, setting out the name,—that the witness subscribed in the presence of the maker of the deed, *and in the*

presence of each other, and on the day and year named in said deed. These are guards which the legislature have thought proper to throw around the proof of execution of deeds to prevent frauds, and as the act prescribes the form to be observed, the courts cannot dispense with a substantial compliance with it. *Phipps v. McGehee*, 5 Por. 413. It is clear the deed is not void upon its face. The only objections urged to it are, that there is no time fixed when the trustee shall execute the trust, but that the time of the sale is to depend upon the volition of the *cestuis que trust*. The trustee, by the deed is authorized to sell the property upon default of payment of the debt secured, when it falls due, and the fact that he *may* wait until he is required by the *cestuis que trust* to sell, does not have the effect to postpone the law day in the deed. See 8 Ala. Rep. 694. So, neither is it a circumstance from which we may infer the deed fraudulent, that the grantor invests the trustee with a discretion as to the manner of selling, whether privately or publicly. It may often times be highly beneficial to all concerned, to vest in the trustee a liberal discretion as to the disposition of the trust property. The courts will hold him responsible for any abuse of that discretion by which an injury is worked to the prejudice of the parties. In *Vernon v. Smith & Morton*, 8 Dana R. 251, it is held, that a stipulation in a trust deed that salaries shall be paid the trustees out of the trust property—that they may employ agents and pay them out of the trust funds, is neither indicative of fraud, or improper.

2. The admission of evidence by Houston, the county clerk, who testified that the deed was proved before him as stated in the certificate, though such proof might be improper, unless the certificate should be attacked for fraud, or a clerical mistake attempted to be shown, cannot be regarded as an error prejudicial to the plaintiff in error. The deed was not read as a recorded instrument, and consequently, this proof, which was not allowed to dispense with proof of its execution by other witnesses, could not prejudice the party. We see no error in the admission of evidence.

3. The charges given by the court are perhaps more favorable to the plaintiff in error, than by law he was entitled to ask. This court has uniformly held that a demand before

action brought is not necessary, except where it was required to render the detention of the defendant unlawful, as, for example, where it terminates the relation of bailor and bailee. *Bettes, adm'r, v. Taylor*, 8 Porter's Rep. 564. The point as to whether the plaintiff is bound to prove a bailment to sustain his first count, is not presented by the record. The defendant, if he desired to raise that point, should have asked a charge involving it.

That a sale of goods inclosed in boxes, and not exposed to the view of the bidders, is evidence of fraud, and highly reprehensible, there can be no doubt. But it is shown in this case that the plaintiff below had no connection with this sale; and while the maker of the deed, or any one interested, could set aside the sale upon an appropriate application, and charge the *cestui que trust* with the actual value of the goods so sold, yet it cannot have the effect to render the trust deed void, if in its creation it was *bona fide*. If the goods thus sold were of value sufficient to satisfy the demand of *Hudson & Brockman*, who caused the sale thus to be made, and there was no further claim to be satisfied out of the effects assigned, it might become a question whether the deed could be asserted against *Brock*, the purchaser; but even in this case, we apprehend a court of law could not in this collateral way declare the deed satisfied, by reason of damages accruing to the maker on account of the unlawful or fraudulent sale or conversion of the property by the *cestuis que trust*. As, however, the point does not necessarily arise in this case, we will leave it open.

The charge asked was, that the deed should be considered fraudulent, from the mere fact that a portion of the property conveyed was sold in an improper manner, and this, without respect to the value of the property, or the injury which may have resulted from the act. It is not shown that any one was injured by the sale, or, that if the goods had been offered in the regular way, they would have sold for more. Under such a state of facts, it would be going too far to say that the demand must be regarded as paid, and the property discharged from the trust.

The second charge asked was obnoxious to the same ob-

jection urged to the first. A stranger to the trust could not require the trustee to account for the property conveyed by the deed, and which had not been disposed of. We do not wish to be considered as deciding, however, that a *bona fide* purchaser of property left in the possession of the grantor in a trust deed, from such grantor, may not show the property he purchased has been discharged of the trust by reason of the payment or satisfaction of the debt secured by the deed; nor, that the deed can be held over the property of a debtor, for the fraudulent purpose of screening it from the payment of his debts; for it is too well settled to require the aid of authority to sustain the position, that a deed, valid at its inception, may become inoperative as a security by matter *ex post facto*. The point we decide here is, that after the law day, and before the extinguishment of the demand secured, the trustee has a right to recover by suit the property conveyed by the deed, and which has not been disposed of according to the requisitions of the trust, without being required, in a proceeding at law, to account for the property sold, or for that which remains. If the defendant alleges a satisfaction of the deed by sales of property or otherwise, he must prove it.

The declarations of Hudson would clearly have been incompetent, if offered by the plaintiff below, but they were offered by the defendant, and of course he is estopped from gainsaying their effect as evidence, and it was not indispensable that the note, which was the evidence of the demand, should have been introduced, after this proof was made. The case of Lockhart v. Graham, 8 Ala. R. 9, is in point.

The demurrer was properly overruled. The declaration is in the usual form, (see 2 Ch. Pl. 594,) and conforms to the precedents in the books. It results from what we have said, that there is no error shown by the record.

Let the judgment be affirmed.

FOSTER & BATTELLE v. JOHNSON.

1. J addressed a letter to N, a book-keeper in the house of F & B, grocers, in Mobile, requesting N to send him some groceries to Selma. N turned over the bill to the proper clerk of the house, who forwarded the goods as requested. N had previously lived in Selma, was indebted to J, and was insolvent. It was proved that clerks were in the habit of receiving orders from their friends, which they filled, and charged to their friends on the books of the house from which they purchased. Held, that it should be left to the jury, under the testimony, to determine the nature of the authority to N, and the liability of J to F & B.

Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

ASSUMPSIT by the plaintiff in error.

From a bill of exceptions it appears, that the defendant who lived in the interior, wrote a letter to one Nance, a clerk in the house of the plaintiff, at Mobile, requesting him to send him some articles in the grocery line. Nance had previously lived in Selma, and was indebted to the defendant. Upon receiving the order, Nance handed it to another clerk in the establishment, by whom the articles were put up, charged to the defendant, and transmitted to him. It was proved, that it was customary in Mobile for clerks to receive orders from their friends in the country for goods, and for the employers to fill the order, and look to the person ordering the goods for payment, although the order was not directed to the principal, but to the clerk. It was in proof that Nance was insolvent.

The court charged the jury, that the letter to Nance gave him no authority to purchase the goods on the credit of the defendant, and that it was unimportant whether the plaintiffs were, or were not apprised of the contents of the letter to Nance. To this charge the plaintiffs excepted, and now assign it for error.

J. W. LAPSLEY, for the plaintiff in error, made these points:

1. In the letter from defendant to Nance, set out in the bill of exceptions, the defendant made Nance his agent to procure the goods. This is a fair interpretation of the letter. If it be said the language of the letter is ambiguous, and may mean something else, then the law says, if the meaning be ambiguous, it must be construed most strongly against the writer. See Story on Agency, 71, § 74; Kingston v. Kincaid, 1 Wash. C. C. 454, § 74.

The usage was good to fix the meaning of the letter.—Story on Ag. 73, § 76, 77; Cases in 3 U. S. Dig. 234; Munn v. Commission, 15 Johns. 44; Williams v. Mitchell, 17 Mass. 98.

Private instructions of defendant to Nance, could not affect plaintiffs unless known to them. Story on Ag. 70, § 73.

An authority is to be so construed as to include all necessary and usual means for executing it with effect. Theob. on Ag. 255; Howard v. Bailey, 2 H. Blacks. 618; Story on Con. § 287. In construing the letter, as was done by the court, the letter alone should be looked to. The court could not look to any parol evidence to aid in construing the letter. Story on Ag. 73, § 76, 77.

2. That the court erred in charging the jury, that the plaintiffs could not recover, as was done in the final charge. The evidence set out in the bill of exceptions shows, that the goods were shipped by the plaintiffs—the bill of lading showed this fact—that the goods were charged on the books of the plaintiff, by Nance, to the defendant; and the proof conduces to show, that these facts were known to the defendant when he received the goods.

G. W. GAYLE, contra.

1. The letter of Johnson to Nance, (the clerk of plaintiff,) clearly shows, that Johnson intended that Nance should forward him goods on account of Nance's indebtedness to him. This intention is indicated by Nance's indebtedness to Johnson, and by the expression in his (J's) letter, "if perfectly convenient, send me," &c. Also, by the expression in the letter, "also, if you can do it without incommoding yourself," &c. It was not Johnson's intention, as above seen, to

contract with Foster & Battelle, or with Nance as their agent ; and neither can make Johnson their debtor without his consent. See *Weakly v. Brahan & Atwood*, 2 Stew. 500.

2. If the jury should have construed the letter of Johnson, plaintiffs cannot complain, because the court construed it at their request ; and the construction was proper as above shown.

3. The court had no right to charge the jury, "that on the evidence as above stated they should find for the plaintiff." 1. The court having construed the letter at plaintiff's request, that construction authorized a verdict for defendant. The evidence was no longer doubtful, and the court correctly charged that defendant was entitled to a verdict. 2. If the evidence were doubtful, as contended by the plaintiffs, the court then had no right to declare the effect of the evidence, but it belonged to the jury. See *Stewart, et al. v. Hood, et al.* 10 Ala. 600.

COLLIER, C. J.—In *Child, Hibbler & Pearson v. Wofford*, 3 Ala. Rep. 564, the defendant addressed a letter to the plaintiff, Child, at the city of Mobile, requesting the latter to send him goods according to a bill annexed. C. and his co-plaintiffs were doing business as partners and commission merchants in that city, and not otherwise, and the defendant resided about two hundred miles in the interior. The plaintiffs sent the goods, but without a bill of lading or letter ; the defendant, as well as his agent who received them, supposed they were sent by C. individually, and that to him alone the defendant was accountable : *Held*, that the plaintiffs were entitled to recover in an action for goods sold and delivered. This court said, that Child and his co-partners being commission merchants, the former could not be presumed to have been engaged in the business of selling goods upon his own account, and for his own exclusive benefit, and that it was a fact determinable by the usual course of dealing, whether the letter might not be regarded as an order which the firm were authorized to fill. Although the defendant received the goods supposing them to belong to C, yet, having used them, he must account to the plaintiffs ; as he received them without advice from any source, by

whom they were sent. "If the usage of trade did not authorize the plaintiffs to fill the order to Child, the defendant might have refused to receive the goods from them, or having received them under the impression that Child was the sole consignor, immediately upon ascertaining the fact to be otherwise, he could have given notice to the plaintiffs that they would be returned.

In the case at bar, the defendant addressed a letter to Nance, requesting certain articles to be sent him from Mobile to Selma. Nance had previously lived in Selma, was indebted to the defendant some two or three hundred dollars, but at the time the order was given was insolvent, and employed as a book-keeper by the plaintiffs, who were wholesale dealers in groceries in the city of Mobile. It was proved on the trial, that clerks were in the habit of receiving orders from their friends, which they filled and had them charged to their friends, on the books of the house from which they purchased. Further, that Nance had turned over the defendant's order to the proper clerk in the plaintiff's establishment, who forwarded the goods as requested.

Now, although the letter, unassisted by proof, indicates a request to Nance individually, to furnish the articles desired, yet it was certainly competent for the plaintiffs to show Nance's connection with their house, and the usual course of business in reference to such orders as that contained in the defendant's letter. Evidence of this character was adduced, and should have been referred to the jury to determine the nature of the authority to Nance, and the question of the defendant's liability to the plaintiffs. The case cited is directly in point. By the charge to the jury, this evidence was virtually excluded—the letter, unaided by any thing extrinsic, was alone looked to, and the inquiries of the jury entirely foreclosed by the instruction, that it did not authorize Nance to purchase the goods ordered, of the plaintiffs, so as to make the defendant liable to them for their payment.

The judgment is consequently reversed, and the cause remanded.

ISBELL v. BROWN.

1. B, holding a note on L, transferred it to R, by a special contract, providing for its payment, which R afterwards assigned to I, who brought suit against B, on the note, and transfer. B introduced a witness, who proved, that in a certain contingency, certain claims which he held on R, were to be received and allowed, as payment or set off. Held, that R was a competent witness for I, to prove that no such agreement was made, as he was no party to the record, and his interest was equally balanced between B and I. Further, that being competent, he was not rendered incompetent by a release, and transfer executed by I.

Error to the Circuit Court of Talladega. Before the Hon. G. W. Stone.

THE plaintiff in error declared in assumpsit against the defendant, on an instrument in writing, to the effect following: "For value received, I transfer and indorse to James Isbell, to be first paid out of the proceeds of the sale of the land and mills, which the Longs bought of me in the year 1840, and for the sale of which said land and mills I have filed a bill in the chancery court of Talladega, the following described note: \$2,000. By the 25th of December, 1842, we or either of us promise to pay Warner Brown, or order, two thousand dollars for value received, witness our hands and seals, this the 14th Feb'y, 1840. Signed by John Long, James Long, and William F. Long. The said note is entitled to a credit of \$415 50. If the said land and mills do not bring the amount of said note when sold under the decree, then I bind myself to make good the deficiency. Signed, Warner Brown, by W. W. Knox, his agent." The declaration avers, that the land and mills were sold, but yielded nothing to the payment of the note described in the agreement. A trial was had, and a verdict and judgment was rendered for the plaintiff, but being for less than the plaintiff claimed, a bill of exceptions was sealed at his instance, and

the questions growing out of the same are here assigned for error.

The facts disclosed by the bill of exceptions may be thus stated: The plaintiff produced, and read to the jury, the agreement before described, and the record of the chancery suit, from which it appeared that the sale of the land and mills yielded nothing to the payment of the note. The defendant then offered as a witness, W. W. Knox, who stated that he executed the instrument sued on, as the agent of the defendant. That the note described in it, and other claims against Alexander Riddle, which are pleaded as off sets to this action, were left with him, the witness, by Warner Brown, when he removed from the state. That the defendant told him, as he was about leaving, that Alexander Riddle had paid him about \$1,000 in goods, towards the purchase of the note described in the agreement. That when Riddle paid him the balance due, say \$550, the witness was to transfer the note to him, (Riddle.) That after several ineffectual efforts to raise the money, Riddle called on the plaintiff to advance it, and to take the transfer to himself. That agreement was executed by the witness, in the counting room of the plaintiff, in the presence of Riddle and the plaintiff. That before the execution of the agreement, the plaintiff had called on the witness to know what sum he would have to advance, and what amount the note would be certain to realize. That the witness told the plaintiff, if the land and mills brought enough to pay the note, he would receive all that was due on it; but if the plaintiff had to call on Brown for the money, the note would only be good for six or eight hundred dollars, as Riddle owed Brown, and the demands that Brown had against Riddle would reduce the note to about that amount. The plaintiff then paid to the witness \$550, and the witness executed to him the transfer and guaranty sued on. This witness also gave testimony tending to show, that it was known, and understood, as a part of the agreement, that if the note was not paid from the proceeds of the land and mills, and Brown was called on for payment, that the demands held by Brown on Riddle, and which were nearly equal to the interest of Riddle in the

note, should be allowed as payments, or off sets. The same witness then gave evidence, and produced the demands against Riddle; to this testimony the plaintiff objected, on the ground that it permitted parol proof to vary the terms of the written contract sued upon, but the objection was overruled, and the plaintiff excepted.

The plaintiff then offered Riddle, being the same person who had advanced on the note about \$1,000, to prove that the plaintiff, Isbell, had advanced to him his entire interest in the note, and the contract sued on. And also to prove, that there was no such understanding as was stated by the witness, Knox, at the time of the transfer, nor any thing said about it. The defendant objected to his testifying, and the objection was sustained on the ground of interest. The plaintiff then released the witness, Riddle, from all claim and liability on him, growing out of the advances made by him to the witness, on account of said note and agreement sued on, and the witness transferred to the plaintiff all his interest and claim in said note, and the guaranty thereof; and the plaintiff then proposed, after the execution of the release, and the transfer of the interest of the witness to him, to examine him to the facts before stated. The defendant objected, because the witness was interested, and because it was contrary to public policy to permit a witness to transfer his interest in a *chose in action*, in order to give testimony respecting his title. The objection was sustained, and the plaintiff excepted. The witness also offered one McMillan, to prove that he had advanced to the witness the amount of his interest in the note and the agreement sued on; but his testimony was objected to, and the objection was sustained.

The ruling of the court in permitting the witness, Knox, to testify, and in rejecting Riddle, both before and after the release, as a witness, and the rejection of McMillan's testimony is here assigned as error.

L. E. PARSONS, for plaintiff in error, made the following points:

1. The evidence of Knox varies the contract sued on. What is that contract? "Warren Brown binds himself to make good all deficiency which shall or may accrue to Isbell,

in the event the land and mills do not bring the amount of the above described note.

What is the contract which is offered to be proven? In the event the land and mills sell for enough to pay the note, then Isbell would get his pay; but in the event they did not, and the debt came against Brown, then the guaranty would only be good against him for six or eight hundred dollars, because Brown would have off sets against Riddle that would reduce it to that amount. Can a more striking case be put than this, of an attempt to make an entirely new contract by parol evidence?

The reason why it would only be good against Brown for six or eight hundred dollars is wholly immaterial, because if the door is ever opened, or the rule relaxed, there will always be reasons enough.

That this evidence is incompetent, see *Brown v. Isbell*, 11 Ala. 1020; 3 Phil. Ev. 1473, 1475, and cases cited C. & H's Notes; and the authorities cited in the brief of counsel for defendant in error in 11 Ala. 1020.

The sets off were not shown to be the property of Brown. That payable to Cunningham & Dixon, was in Brown's possession merely. Their indorsement of the note was not proven. This should have been done. *Crayton v. Clark*, 11 Ala. 787.

Riddle was a competent witness, and he should have been examined. 11 Ala. 884; 5 Ib. 580. And this even before release. *Lockett v. Child*, 11 Ala. 640; *Myatt v. Lockhart & Massey*, 9 Ala. 91. See also, 5 Hill, 477, and cases cited.

S. F. RICE, contra.

DARGAN, J.—The first question presented is, that the court erred in permitting the witness, Knox, to testify, that it was a part of the agreement, or transfer of the note, that if the land and mills did not yield enough to pay the note transferred, and the plaintiff should have to look to Brown for payment, that then the demands held by Brown against Riddle should be good off sets, has been settled in this case. In 11 Ala. Rep. 1009, this contract, and this testimony, were before the court, and it was held, that this testimony was

permissible, by way of showing the consideration of the transfer to the plaintiff, Isbell, and for the purpose of limiting his recovery accordingly. It is sufficient to say, that this decision is the law of this case. But we think the court erred in rejecting the testimony of Riddle. The suit was not in his name, nor did his name appear in the record. He had an interest of one thousand dollars in the note, which interest Brown claimed should be compensated or satisfied by debts to that amount due from Riddle to him. Isbell claimed, that he had on the faith of that interest, advanced to Riddle the amount of it. Riddle did not deny either the debts held on him by Brown, or the debt, or advances, made to him by Isbell. How then did he stand? He had a claim of \$1,000 in the note. The defendant says this claim must be extinguished according to the terms of the contract sued on, by the debts Riddle owes me. The plaintiff says there was no such term in the contract, and I claim to have this interest for advances made to Riddle to the amount of it.

The witness was not called to discharge himself from any debt. It does not appear that he denied his liability to Brown or to Isbell, for the debts claimed of him; but was offered as a witness, to testify which of his two creditors were entitled to this interest, he had in the note, and the agreement sued on. His interest was then entirely balanced. If by his testimony a recovery to the full amount was had, he would still owe Brown the debt. If he had been offered by Brown as a witness, to prove that the demands Brown held against him were to be allowed as off sets to the contract sued on, he would have been competent for that purpose; for if Brown's demands against Riddle had been allowed as off sets, Riddle would still have owed the amount to Isbell. The rule is, that a witness is competent, when his interest is balanced, and who will not be benefitted or injured by the result of the suit.

Thus, if the owner of a slave has sold to two different persons, the vendor, in a controversy with his vendees, in respect to the slave, is a competent witness for either. See *Jones v. Park*, 1 Stew. Rep. 419; 3 Ala. R. 455.

The release executed by Isbell to the witness, and then the transfer by the witness of his interest in the suit, to Is-

bell, which was done in court pending the trial, did not render the witness incompetent, on the ground of public policy. The case of *Powell v. Powell*, 7 Ala. Rep. 582, and the case of *Houston v. Prewitt*, 8 Ala. R. 846, are both distinguishable from this. In both of these cases, the witness endeavored, by a transfer, and release of his interest, to render himself competent. This court held, that this was not permissible, on the ground of public policy. But in the case at bar, the witness was competent to prove the facts, to prove which he was called, before the release and transfer were executed. But being rejected by the court, the release and transfer were executed to remove the objection, when in fact none existed; as the release and transfer do not vest an interest in the witness, and as he was competent when first called, he is still competent.

For the error in rejecting Riddle as a witness, the cause is reversed and remanded.

HARRIS, ASSIGNEE, &C. V. COLLINS AND CARTRIGHT.

1. A suit by the assignee of a bankrupt, must be brought within two years after the decree in bankruptcy, or after the cause of action accrues; and if this fact appears on the declaration, it will be reached by a demurrer.

Error from the Circuit Court of Mobile. Before the Hon. J. Bragg.

ACTION of debt by plaintiff, as assignee in bankruptcy, upon a lease reserving a certain money rent due by instalments in 1839 and 1840, made by defendants to one John Tarleton, who was duly declared a bankrupt in June, 1842, and who then turned over said lease to his assignee, the

plaintiff in error. The suit was commenced 17th November, 1845.

The defendants demurred to the declaration, which demurrer was sustained by the court; and plaintiff now assigns the judgment on the demurrer, for error in this court.

C. W. RAPIER, for plaintiff in error, cited 20 Pick. 2.

O. S. JEWITT, for defendant.

1. The declaration should show a cause of action in the plaintiff. When he sues in the character of assignee of a bankrupt, and claims to be such under the decree of a court of limited jurisdiction, his declaration should show those facts especially which give jurisdiction to the court, to show that its proceedings are *ceram judice*. The declaration is defective in not alledging that the bankrupt was a resident of the southern district of Alabama. *Stiles v. Lay*, 9 Ala. R. 795; *Elliott, et al. v. Piersal, et al.* 1 Pet. 340; *Thatcher v. Powell*, 6 Wheaton, 119.

2. There should have been an allegation of indebtedness by the defendants, either to the bankrupt before the assignment, or to the assignee since.

3. The suit was barred by a limitation in the bankrupt act, it being brought after a lapse of two years from the declaration and decree in bankruptcy. Bank. Law, § 8; *Comegys v. McCord*, 11 Ala. R. 932; *Archer, ass'ee, v. Duval's adm'rs*, Florida Rep. (Jan. term, '47) p. 219.

CHILTON, J.—The suit by the plaintiff, as assignee in bankruptcy, was commenced too late. By the 8th section of the bankrupt act, it is provided “that no suit, at law or in equity, shall in any case be maintainable, by or against such assignee, or by or against any person claiming an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued.” The

plaintiff in error has not brought himself within the provisions of this act. He derives his right to sue, alone from the act which vests in him the legal title for the benefit of the bankrupt's creditors, from the time of the declaration of bankruptcy by the decree of the district court. This right, he cannot exercise after the expiration of two years. Such was the decision of this court in *Comegys v. McCord*, 11 Ala. Rep. 932. The court did not err in sustaining the demurrer. The plaintiff shows he has forfeited his right, by failing to sue within two years.

Let the judgment be affirmed.

SALTMARSH v. TUTHILL.

1. A notice of the dishonor and protest of a bill of exchange, which describes it correctly, but is silent as to the date and time of payment, is *prima facie* sufficient. The interpretation of such a paper is the province of the court, and should not be referred to the jury.
2. A *bona fide* holder of a bill of exchange for value, which he has received before its maturity, and without notice of any defect or infirmity in the title of the party from whom he received it, may recover upon it, though the person from whom he received it acquired it by fraud.
3. H drew a bill of exchange in favor of C, on B & Co., which was indorsed by C, and one S, *on Sunday*, and handed by H, to B & Co., by whom it was transferred to T, in substitution, and extension of a bill for the same amount, on which T had previously advanced money, at a usurious rate of interest, T not having notice that the bill was indorsed on Sunday. Held, that T did not receive the bill, *bona fide*, in the usual course of trade, so as to exempt the paper in his hands from a defence which would have been available against it, as between the original parties; and that the indorsement on Sunday, being in violation of a public statute, was void.

Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

ASSUMPSIT by the defendant in error, against the plaintiff

in error, as indorser of a bill of exchange for \$4,000, drawn by Samuel M. Hill, on Bower & Co., in favor of A. W. Coleman, dated 13th December, 1845, and payable thirty days after date; accepted by Bower & Co., and indorsed by Coleman, and Saltmarsh.

The defendant pleaded—1. *Non-assumpsit*. 2. That the bill was an accommodation bill, and appropriated to a different purpose than was intended by the drawer, first and second indorsers.

3. That the bill was an accommodation bill, and was, after it came to the hands of the acceptor, fraudulently put in circulation by him.

4. That the bill was placed in the hands of the plaintiff, by Wm. Bower & Co., as collateral security, to a debt due by Bower & Co. to the plaintiff.

5. That the bill was taken by plaintiff, from Bower, in satisfaction of a pre-existing debt, due from Bower & Co. to the plaintiff.

6. That the plaintiff discharged the drawer of the bill from the payment of the same, before the institution of this suit.

7. That he did not indorse the bill. This plea is verified by affidavit.

8. Usury; and 9. That the indorsement aforesaid was made on Sunday.

The plaintiff took issue on the first, fourth, sixth, seventh and eighth pleas, and demurred to the second, third, fifth, and ninth, which demurrer was sustained by the court.

A subpoena, *duces tecum*, having issued to one Haig, the defendant produced his deposition. Haig, who was a partner in the house of W. Bower & Co., stated, that the original bill, of which the one sued on was a renewal, was for the same amount, and made by the same parties, due the 13th December, 1845. That this original bill, was, with another, indorsed by Perine & Crocheron, due 20-23 December, 1845, for \$5,000, passed to the plaintiff; and the transaction in its original form, appears upon the books of W. Bower & Co. as follows: Cash book—20 August, 1845. J. W. Tuthill, to an amount borrowed of J. W. Tuthill, on two bills, as follows: one drawn by S. M. Hill, indorsed A. W.

Coleman, and A. Saltmarsh, dated 10th May, at 7 months, due 10-13 December, 1845, \$4,000. One drawn by same, and indorsed, A. W. Coleman, and Perine & Crocheron, dated 20th May, at 7 months, due 20-23 December, 1845, \$5,000. Money got 29th May, \$8,000. The said amount of \$8,000, remained to the credit of J. W. Tuthill's account, until the failure of W. Bower & Co. in February, 1846, when said account was balanced by a transfer of said amount, to the credit of W. Bower & Co. suspended debt account. J. W. Tuthill's loan account, was never charged with the two before described bills. The original bill of \$4,000, did not appear on record in the bill book of W. Bower & Co. The object in closing J. W. Tuthill's loan account, on the books of W. Bower & Co. was for the purpose of condensing all the debts, due by, and to the firm. The court required the plaintiff to admit that this witness would prove these facts, or that the cause be continued. The plaintiff objected to so much, as purported to be a copy from the books of W. Bower & Co. as not competent. The court overruled the objection, and he excepted, and the testimony was read to the jury.

It was also in evidence, that the agent of the plaintiff in said transaction, and Bower, had been intimate, and confidential friends, and that they had assisted Bower with large loans of money, and that the said agent, at the time of obtaining the bill sued on, was fully in his confidence. There was also testimony tending to prove, the bill sued on was taken by plaintiff, from Bower & Co. in payment of a pre-existing debt, due from them to him, and that when so taken, the plaintiff had notice that there was no consideration for the paper passing from defendant, and any other party to it, and that it was an accommodation bill, made for the accommodation of the acceptors, and to be used only in renewal of a debt, due from Bower & Co. to the Life Insurance and Trust Company.

It was further proved, that the plaintiff was a cotton buyer in Mobile, and it was proved by Bower that he was to allow the plaintiff eight per cent. on the loan of \$8,000, and two and a half per cent. for advancing.

It was further proved, that the notice of protest in this case, was sent to Hill, the drawer, at Cahawba, whilst the

nearest post office to his residence, and the one at which he received his letters before and since, was "Pleasant Hill."

The defendant also gave in evidence, the notice of protest, which he had received, as follows: "Mobile, Ala., Jan. 15, 1846. Please to take notice, that a bill of exchange drawn by Samuel M. Hill, on William Bower & Co. for the sum of four thousand dollars, in favor of A. W. Coleman, and indorsed by you, was this day protested by me for non-payment; the holder of which holds you responsible.

I am your obedient servant,

JOHN ROLSTON, Notary Public."

It was also proved, that the defendant indorsed the bill on Sunday. The said William Bower testified, that the several parties to the bill, had been in the habit of accommodating him with their signatures for several years, and that when they signed the bill in this case, they knew it was to go to plaintiff, in the renewal of the original bill; but this was contradicted by Hill, the drawer, and Coleman, the indorser, who swore it was made in blank, and for a different purpose. The plaintiff was not informed that the bill was indorsed on Sunday.

The defendant moved the court to charge—1. That if the bill sued on, was not received by the plaintiff in the usual course of trade, it was subject to all the defences existing between the original parties. The court gave the charge with this qualification, that if the defendant knew when he signed it, that it was to go in renewal of a previous bill, such would not be the case.

2. That if the bill sued on was received as a collateral security, it was not received in the usual course of trade; which the court gave with the same qualification.

3. That if the said bill was received in renewal, or payment of a pre-existing debt, with notice, there was no consideration passing between the original parties, it was not received in the usual course of trade; which charge the court gave, with the same qualification.

4. That if the jury believed, the plaintiff was an usurious holder, or the usurious indorsee of the defendant, he did not receive the bill in the usual course of trade; which the court refused.

5. That if Hill, being an accommodation drawer, was discharged by want of notice, the plaintiff cannot recover; which charge the court refused to give.

6. That the jury were the judges of the facts, which were to determine that issue, for or against the plaintiff; which the court refused to give.

7. That if the notice of protest to the defendant, was calculated to mislead him, the plaintiff cannot recover; and the jury were to judge, whether he was liable to be misled; which the court refused, and charged that the notice was in form and language sufficient.

8. That if they believed, the defendant was misled by the notice, so as to lose his remedy against Hill, the drawer, the plaintiff cannot recover; which the court refused.

9. That if the defendant indorsed the bill on Sunday, the plaintiff could not recover; which charge the court refused to give, and charged that he could recover, unless he knew that it was so indorsed.

10. That if the bill was not received in the usual course of trade, and was indorsed on Sunday, the plaintiff was not entitled to notice that it was so indorsed; which charge the court refused to give.

11. That if the plaintiff was an usurious holder of the bill sued on, he was not entitled to notice that it was indorsed on Sunday; which the court refused, and the defendant excepted to each refusal to charge, and to the charges given.

The assignments of error present the matters of law arising out of the bill of exceptions, and the sustaining the demurrers to the several pleas of the defendant.

G. W. GAYLE, with whom was P. HAMILTON, for plaintiff in error.

1. The court below erred in sustaining the demurrer to the second plea, which was, "that said bill was an accommodation bill, and appropriated by the acceptors to a different purpose than was intended by the drawer and first and second indorser." See *Chitty on Bills*, top page, 81, 335, n., 9th Am. ed.; *Wardell, et al. v. Howell*, 9 Wend. 170.

2. The court below erred in sustaining the demurrer to the third plea, which was, "that said bill was not an accom-

modation bill, and was, after it came to the hands of the said acceptors, fraudulently put in circulation by them." See *Hill v. Gayle & Bower*, 1 Ala. 275; 2 Eng. C. L. 366, 433; *Zeigler v. Gray*, 12 S. & R. 42; 9 S. & R. 385.

3. The court below erred in sustaining the demurrer to the fifth plea, "that said bill was taken by said plaintiff from said Wm. Bower & Co. in satisfaction of a debt due from said Wm. Bower & Co. to said plaintiff." See *Ontario Bank v. Worthington*, 12 Wend. 593; *Coddington v. Bay*, 20 J. R. 637; *Rosa v. Brotherson*, 10 Wend. 85; see also *Stalker v. McDonald*, 6 Hill's N. Y. Rep. 93, reviewing the English and American authorities, and disapproving the case in 16 Peters, p. 1. These decisions have been sanctioned by our supreme court, with the qualification that the holder must have notice of the equities between the original parties, adopting 16 Peters, 1. See *Bank of Mobile v. Hall*, 6 Ala. 639.

4. The court erred in sustaining the demurrer to the 9th plea, "that the defendant's contract of indorsement aforesaid was made on Sunday." The declaration and plea suppose the plaintiff and defendant present making the contract of indorsement, and that the plaintiff knew when it was made, being present. See *Pierce v. Hill*, 9 Porter, 151; *O'Donnell v. Swinney*, 5 Ala. 467; *Dodson v. Harris*, 10 Ala. 566; *Shippey v. Eastwood*, 9 Ala. 198.

5. The court below erred in qualifying the first charge asked by plaintiff in error. This qualification had a tendency to, and did, lead the jury from the consideration of facts sufficient to warrant a verdict for the defendant, viz., from the facts—1. That there was no consideration for the bill, and the holder an usurious one, and not entitled to notice, of equities between the original parties. 2. Because the books of the acceptor show the bill to have been taken by the holder as a collateral. 3. That it was intended for one purpose, and misapplied—proved by two witnesses and holder, charged with constructive notice.

6. The court below erred in refusing to give the fourth, fifth and sixth charges asked. See *Chitty on Bills*, top p. 81, 9th Am. ed.; *Id.* 335, note; *Wardell, et al. v. Howell*, 9 Wend. 170. See as to usury, *Fariss, et al. v. King*, 1 Stew.

255; Wright v. Elliot, Id. 391; Ely v. McClung, 4 Por. 128. As to *bona fide* holder, Ramsey v. Morgan, 16 Wend. 574.

7. But the discharge of an accommodation drawer (entitled to notice) by sending notice to a wrong post office, discharges one subsequently liable on the paper, upon two principles. 1. It amounts to a payment; and 2. It cuts off the indorsee from one of his means of indemnity, as he, in his recourse upon the drawer, can have the benefit of the notice given by the holder. See Bickerdike, et al. v. Bollman, 1 T. R. 406, 409; Smith v. Knox, 3 Esp. R. top p. 46; English v. Darley, Id. 48; Haling v. Blackhall, 2 Black. R. 1235; Lambert v. Oaks, 1 Salk. 127, in point; Lambert v. Oaks, 12 Mod. 244, in point; Sargeant v. Appleton, 6 Mass. 85, in point; Chitty on Bills, 465-6, t. p.; Norman v. Bank of Ala. 3 Por. 355; Kennon v. McRae, 7 Id. 175; Roscow v. Hardy, 12 East, 433, in point; Butler v. Denham, 2 McCord, 350, in point; Galpin v. Hard, 3 Id. 394, in point; Bank v. Ayers, 16 Pick. 392; Chitty on Bills, 9th Am. ed. 466, in point. Accommodation drawer entitled to notice. Sherrod v. Rhodes, 5 Ala. 683. The indorser entitled to the benefit of notice given by holder. See Sherrod v. Rhodes, 5 Ala. 683; Chitty on Bills, 9th Am. ed. t. p. 523, 525.

8. The court below erred in refusing to give the tenth charge asked by plaintiff in error, "that if the proof showed that the defendant indorsed the bill sued on, on the first day of the week, commonly called Sunday, the plaintiff could not recover." 1. Every indorsement is a new contract. See Kennon v. McRae, 7 Por. 175. 2. Contracts made on Sunday void, and subsequent acknowledgment cannot make it good. See Pierce v. Hill, 9 Por. 151; O'Donnell v. Sweeney, 5 Ala. 467; Dodson v. Harris, 10 Ala. 566; Shippey v. Eastwood, 9 Ala. 198. As to qualification of charge, see Wilson v. Mason, 1 Cranch, 45.

9. The court below erred in refusing to give the eleventh charge asked by the plaintiff in error, "that if the bill was not received in the usual course of trade, and was indorsed by the defendant on Sunday, the plaintiff then was not entitled to notice that it was so indorsed." In reason, if a holder who gets a bill not in the usual course of trade, is not entitled to notice that the bill is void for want of consideration, he is not

entitled to notice that it is void as a contract made on Sunday. See *Andrews & Co. v. McCoy*, 8 Ala. 920; *Coddington v. Bay*, 20 T. R. 637; *Ontario Bank v. Worthington*, 12 Wend. 593; *Rosa v. Brotherson*, 10 Wend. 85.

J. W. PRYOR and T. & J. F. WILLIAMS, for the defendant in error.

1. A bill received in payment of a pre-existing debt, is received in the usual course of trade, though the holder knew the bill was an accommodation bill, such holder is a *bona fide* holder for value. Nothing is said about the time plaintiff received the bill. The whole record shows it was conceded on the trial, that plaintiff received it before maturity, &c. That knowledge of plaintiff that it was an accommodation bill will not defeat his recovery. Story on Bills, § 191, 253; *Smith v. Knox*, 3 Esp. 46, 47; *Powell v. Waters*, 17 John. 180; *Bank Chenango v. Hyde*, 4 Cow. 567, 573; *Grandin v. Le Roy*, 3 Paige, 509, 510-11.

2. As to the count for indorsement on Sunday. Count for indorsement was not void. For construction of the English statute on Sunday, see *O'Donnell v. Sweeny*, 5 Ala. R. 469; *Shippey v. Eastwood*, 9 Id. 198; *Butler v. Lee*, 11 Id. 885. For the construction of the English statute, *Blaxsome v. Williams*, 3 B. & C. 232; *Ib.* 10 E. C. L. 60; *Fennel v. Ridler*, 5 B. & C. 406; *Ib.* 11 E. C. L. 261; *Begbie v. Levy*, 1 Tyrwhit, 130-31.

If bill indorsed on Sunday not competent to defendant, who has been guilty of a breach of the law, to set up his own misconduct as an answer to his indorsement in the hands of plaintiff, who is an innocent holder. *Blaxome v. Williams*, *Fennel v. Riddler*, *Begbie v. Levy*, *supra*.

If bill indorsed on Sunday, but not negotiated until a subsequent day, the contract was not completed until the bill was negotiated. *Clough v. Davis*, 9 N. Hamp. 500; *Blaxsome v. Williams*, *supra*; *Norton v. Powell*, 43 E. C. L. 30, 33; *Bank of Chenango v. Hyde*, 4 Cow. 567, 572. Very clear distinction between the *act* of indorsement and the *contract* which vests bill in the holder. That legislature has prohibited an act, does not make the act void. *Br. Bank v.*

Crocheron, 5 Ala. 250, 255; Whetstone v. Br. Bank, 9 Ib. 875, 883; Story on Bills, 220 § 189, ed. 1847.

3. There is no evidence in the record tending to prove that the bill was received in the usual course of trade. But what is the usual course of trade, is not for the jury to decide. It is a question of law. But suppose the plaintiff not entitled to notice, what then? This prayer has no legal conclusion.

4. As the acceptors were in possession of the bill before maturity, it will be presumed that it was made for their accommodation. Brown v. Tabor, 5 Wend. 566-7; Stall v. Catskill Bank, 18 Ib. 466, 478.

Payment so as to bind third parties, means payment at maturity, and not payment by anticipation. Story on Bills, § 417; Barbridge v. Manners, 3 Campbell.

Bona fide holder of a bill or note is one who has paid value for it before maturity, without having participated in any fraud involved in the circulation, &c. Story on B. § 416, 194; Crook v. Jades, 5 Barnw. & Ad. 909; Ib. 27 E. C. L. 234; Barthoun v. Harrison, 5 B. & A. 1098; Ib. 27 E. C. L. 276; Goodman v. Ellis, 10 Ad. & El. 784; Ib. 37 E. C. L. 235; Musgrove v. Drake, 5 Ad. & El. N. S. 185; Ib. 48 E. C. L. 185.

COLLIER, C. J.—*Prima facie*, the holder of a bill is presumed to have acquired it for a valuable consideration, and is not bound to show that he has paid any thing for it, until the other party has established the want, or failure, or illegality of the consideration, or that the bill had been lost or stolen before it came to the possession of the holder. When this has been done, it may be incumbent upon him to show, that he has given value; for under such circumstances, he ought not to be placed in a better situation than the antecedent parties, through whom he obtained the bill. Story on Bills, § 193. Every person, says the same learned author, is treated as a *bona fide* holder for value, who has advanced money or other property upon it, or who has received it in payment of a precedent debt, or has a lien on it, or has taken it as collateral security for a precedent debt, or for future as well as past advances. Thus, a banker, who is accustomed to make

advances or acceptances from time to time for his customers, and has in his possession negotiable securities belonging to them for collection, is deemed to be a holder for value, to the extent of such advances and acceptances. In every such case, he is deemed to have a lien on such securities for the balances from time to time, as well as for such acceptances, by the implied consent or agreement of his customers, resulting from the usage or course of business. *Id.* § 192, and note 3.

In the *Bank of Mobile, et al. v. Hall*, 6 Ala. Rep. 639, it was held that a negotiable note received before its maturity in payment of a pre-existing debt, is negotiated in the usual course of trade, and the previous parties to the paper cannot avail themselves of a defence against the holder, of which he had no notice. But where the transfer is made as an indemnity against future loss on an existing suretyship, the transaction is not in the usual course of trade, so as to preclude the maker from interposing such a defence.

If, however, the holder of a negotiable instrument, at the time he acquired it, knew that circumstances existed which rendered it improper that payment should be enforced, he will not acquire any better interest in the same than the party had, who transferred it to him. A person, therefore, who receives a bill with notice that it is to be negotiated only upon certain terms, or for a particular purpose, holds the bill subject to such terms. *Chitty on Bills*, 264, 9th Am. ed.

In *Wardell v. Howell*, 9 Wend. Rep. 170, it was held that receiving the transfer of a note as collateral security for the payment of a *pre-existing debt*, is not taking it in the ordinary course of trade, and for a valuable consideration, as between the *creditor* and an *accommodation* indorser: consequently, a note indorsed for the *accommodation* of the maker, delivered to him to be used in *renewal* of a former note about to fall due at a bank, transferred by the maker as collateral security for the payment of *another debt* owing by him, cannot be enforced against the indorser by the creditor to whom such transfer is made. It was also decided, that, where a note has effected the substantial purpose for which it was designed by the parties, an *accommodation indorser* cannot object that it was not effected in the *precise manner* contem-

plated at the time of its creation ; but where a note has been diverted from its original destination, and fraudulently put in circulation by the maker, or his agent, the holder cannot recover upon it against an accommodation indorser, without he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration.

When a bill has once been paid by the acceptor, after its maturity, it loses all vitality, and is no longer negotiable ; but if paid before it becomes due, and the fact of payment be unknown to a holder, who acquires it in the due course of trade, it will be a valid security in his hands. Story on Bills, § 223 ; Chitty on Bills, 9 Am. ed. 248, 249, and notes ; Bayley on Bills, 5 ed. 165, 166 ; Smith's Mer. Law by H. & G. 222 to 224, and citations in notes ; Wallace v. The Br. Bank at Mobile, 1 Ala. Rep. 565.

The principles we have stated are decisive of the questions arising on the second, third, and fifth pleas, and the ruling of the circuit court on the four first prayers for instruction, except so far as the question of usury may be embraced by the qualification which followed the first, second, and third charges ; and they clearly show that there is no error thus far, of which the defendant can complain, unless it be in the exception stated—a point which we will hereafter consider.

The acceptor of a bill is primarily liable for its payment, and the act of indorsing is equivalent to drawing a new bill ; every indorser thereby separately undertakes, as well as the drawer, that the drawee shall honor the bill, and the holder may consequently resort to him, without calling on any of the other parties. It is the business of the indorser, as soon as he has received notice himself, to forward the like notice to the drawer, and all persons to whom he means to resort. In general, it is advisable for the holder to give notice to every party as he can ascertain his residence ; for otherwise he will be without remedy against him, unless some other party to the bill has given him notice, in which case such notice may enure to his use. Whitman and Hubbard v. The Chattahooche Bank, 8 Port. Rep. 258 ; Chitty on Bills, 369, 530, (9th Am. ed.) and notes. Thus we see that it is immaterial in this action against the second indorser, whether the drawer

of the bill had due notice of its dishonor; and consequently there is no error in the refusal of the circuit judge to give the sixth and seventh charges prayed.

We do not perceive any objection to the notice of the dishonor of the bill, which the notary who protested it transmitted to the defendant. The notice states the date of the protest, the amount of the bill, the names of the drawer, acceptors, and indorsers, in consecutive order. The only other requisites to a perfect description of the bill are, its date and time of payment, and these are not indispensable to inform the drawer or indorser what particular paper has been dishonored; the notice furnishes other and satisfactory *criteria* for its identification. It does not appear that the defendant had indorsed more than one bill for the same amount, and between the same parties, maturing about the date of the protest, so that if proof of these facts could impair the effect of the notice, in the absence of such evidence it is quite sufficient. See *Moorman v. The State Bank*, 3 Port. Rep. 353. The written notice being produced, it was the province of the court to determine its meaning, and to say whether, upon its face, it was sufficient. There is no fact for the decision of the jury arising upon such a paper—its interpretation upon well established principle is referable to the judge. *Mills v. The Bank of the U. S.* 11 Wheat. Rep. 431; *The Bank of the U. S. v. Carneal*, 2 Pet. Rep. 552; *The Bank of Alexandria v. Swann*, 9 Id. 33; *Musson v. Lake*, 4 How. U. S. Rep. 282, op. of Woodberry, J.; *Gilbert v. Dennis*, 3 Metc. Rep. 495; *Cowles v. Harts, Johnson & Co.* 3 Conn. Rep. 516; *Ransom v. Mack*, 2 Hill's N. Y. Rep. 587; *Meirs v. Brown*, 11 Excheq. Rep. 372; 2 Kent's Com. 2d ed. 108; *Higgins v. Morrison's Ex'r.* 4 Dana's Rep. 105; *Chit. on Bills*, 9th Am. ed. 501-2; *Stockman v. Parr*, 11 Mees. & Welsb. Rep. 809; *Strange v. Price*, 10 Adol. & Ellis' Rep. 125; *Hartley v. Case*, 4 Barn. & C. Rep. 339; S. C. 1 Bing. New Cases, 194; *Bank of Cape Fear v. Seawell*, 2 Hawks' Rep. 560; *Story on Bills*, § 390. According to the English decisions, no form of words is necessary to be used in giving notice of the dishonor of a bill of exchange, but the language employed must be such as to convey notice to the par-

ty what the bill is, and that payment of it has been refused by the acceptor. Many of these decisions require unnecessary strictness and particularity, but some of the more recent cases manifest a disposition to conform to the common understanding of merchants, and public convenience. The courts have laid hold of any expressions in the notice, which might fairly be presumed to indicate that a due presentment or dishonor had taken place, and that the notice was designed to put that fact as the ground of the liability. It has consequently been held, that notices which omit to state the date, or time of payment, and that the holder looks to the drawer or indorser for payment, were sufficient. In addition to the above citations, see *Lewis v. Gompertz*, 6 Mees. & Welsb. Rep. 399; *Houlditch v. Cauty*, 4 Bing. New Cases, 411; *Smith v. Boulton*, 1 Hurl. & W. Rep. 3; *Grugeon v. Smith*, 6 Adol. & Ellis, Rep. 499; *Cooke v. French*, 10 Ib. 131, note; *Robson v. Curlewis*, 1 Carr. & Marsh. Rep. 378; *Wathen v. Blackwell*, 6 Eng. Jurist, 738; *Stockman v. Parr*, 7 Id. 886; *Stocken v. Collins*, 9 Carr. & P. Rep. 653; *King v. Bickley*, 2 Adol. & Ellis, New Rep. 419.

The rule adopted in the American courts is said to be far more liberal than that generally maintained in the English courts, and proceeds upon the ground that it is sufficient to state in the notice, that the bill or note has not been paid, and either expressly or by implication, that the holder looks to the indorser for reimbursement or indemnity. If, however, there be no statement of the dishonor of the paper, nor any thing from which it can fairly be implied, that a due presentment has been made, the notice would seem to be fatally defective. Story on Prom. Notes, § 354.

In addition to the description of the bill, the notice in question states, that the bill was protested by the notary for non-payment, on the day of its date, and that the holder looks to the responsibility of the defendant. It is not essential to a notice that it should affirm, that the bill was duly presented for payment, and that payment was refused. This is intended from the recital of the fact, that the bill was protested for non-payment. If the protest was irregular, or made without a due presentment, it

was competent for the defendant to have shown the fact, and thus have destroyed its effect and made the notice un-availing. This view may suffice to vindicate the ruling of the circuit court upon the eighth and ninth prayers for instructions.

We proceed now to consider, whether the fact that the defendant's indorsement was made on Sunday, will avail as a defence to the action. By a statute passed in 1803, it is enacted, that "no wordly business or employment, ordinary or servile work, (works of necessity or charity excepted,) &c. shall be done, performed, or practised by any person or persons within this state, on the Christian Sabbath, or first day of the week, commonly called Sunday; and every person being of the age of fourteen years, or upwards, offending in the premises, shall for every such offence forfeit and pay the sum of two dollars," &c. Clay's Dig. 592, § 1.

In New Hampshire there is a similar statute, which prohibits every person from performing "any labor, business or work of their secular callings, works of necessity and mercy only excepted," &c. Under this enactment it seems to be conceded, that all secular contracts made on the Sabbath are void, yet it has been held, that where a note was written and signed on Sunday, but not delivered to the payee, the contract was not completed—delivery being essential to make it operative. *Clough v. Davis*, 9 N. Hamp. Rep. 500. So the mere indorsement of a note or bill for the benefit of the maker or acceptor, does not become a contract binding upon the indorser until the maker or indorser has negotiated it. *Sauerwein v. Brunner*, 1 H. & G. Rep. 477.

The statute of 29 Car. 2, c. 7, § 1, prohibits every person from doing or exercising "any worldly labor, business, or work of their ordinary callings upon the Lord's day;" and under its provisions it has been held, that an indorsee may recover against the acceptor of a bill dated on a Sunday, when there is no evidence that the bill was excepted on that day. The court said, "it does not appear that any contract was completed on the Sunday, which the defendant was not competent to enter into, notwithstanding the statute; nor, assuming that there was, is it competent to the defendant who has been guilty of a breach of the law, to set up his

own misconduct as an answer to his acceptance in the hands of an innocent holder." *Begbie v. Levy*, 1 Tyrw. Rep. 130.

It is laid down by elementary writers, as well as in the adjudged cases, that a *bona fide* holder for value, without notice, is entitled to recover upon any negotiable instrument, which he has received before its maturity, notwithstanding any defect or infirmity in the title of the person from whom he derived it; although such person may have acquired it by fraud, or even by theft or robbery. The same doctrine is in general applicable to one thus becoming the holder of negotiable paper, where the note or bill, or the indorsement thereof, is founded on an illegal consideration. The law upon this point is founded in public policy, and there is no distinction between a case of illegality, where the consideration is tainted with moral crime, which is *malum in se*, or where it violates the positive prohibition of a statute, which is *malum prohibitum*; for in each case the innocent holder may be otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not altogether stopped. The only exception is, where the statute creating the prohibition has, at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has notice of the illegality or not. There are few cases in which any statute has created a positive nullity of such instruments. The most important seems to be the statutes against *gaming* and *usury*. Neither is it any defence, that the note or bill was known to the holder to have been made, drawn or endorsed for accommodation, as between the other parties, if he takes it *bona fide*, for value, before it becomes due. The reason is, that the object of accommodation paper is to enable the parties thereto, by a sale, or negotiation thereof, to obtain for it a free credit and circulation; and this object would be frustrated, unless the purchaser or other holder for value could hold such paper by as valid a title, as if it were founded in a real business transaction. In fact the parties to every accommodation note or bill, hold themselves out to the world, by their signatures, to be absolutely bound to every person who shall take the same

for value, to the same extent as if that value were personally advanced to them, or on their account, and at their request. Story on Prom. Notes, § 191 to 197; Smith's Mer. Law, H. & G. ed. 261 to 263, and citations in notes.

Chitty, in his Treatise on Bills, says, that unless the legislature has *expressly* declared that the illegality of the contract or consideration, shall make the security, whether bill or note, *void*, illegality of consideration will be no defence in an action at the suit of a *bona fide* holder, without notice of the illegality, unless he obtained the bill after it became due. Thus in an action by the indorsee against the maker of a promissory note, the defence insisted on was, that the note had been given for hits against the defendant in a lottery insurance. Lord Kenyon observed, that the innocent indorsee of a gaming note, or note given on an usurious contract, could not recover, but that in no other case could the innocent indorsee be deprived of his remedy on the note; and that a contrary determination would shake paper credit to the foundation. The ground upon which gaming and usury are made an exception, is, that the statutes declare the *securities void*; and the law in respect to these, under the influence of commercial policy, has been modified in England, and perhaps some of the States of the Union. Chit. on B. 9th Am. ed. 110 to 117. This distinction has been repeatedly recognized. Thus the statute of 7 Geo. 2, c. 8, makes *wagers* and *contracts* in nature of wagers, *&c. void*, yet it has been held, that as it does not avoid *bills, notes, and securities*, but only the *contracts*, a bill or note on such a contract is valid in the hands of a *bona fide* indorsee, receiving it without notice, before it was due. Day v. Stuart, 6 Bing. Rep. 109; 2 Man. & R. Rep. 422; Amory v. Merewether, 2 B. & Cresw. Rep. 573; Brown v. Turner, 7 T. Rep. 630; Steers v. Lashley, 6 T. Rep. 61; Aubert v. Maze, 2 Bos. & P. Rep. 374; Story on Bills, § 189, and note 2; 3 Kent's Com. 4th ed. 79, 80.

We have seen that the act of 1803, inhibits all "worldly business or employment, or servile work, (works of necessity or charity excepted,") and goes quite beyond the English statute, which applies to the business of one's "ordinary calling." Now the indorsement of a bill, and delivery of it to

the acceptor, to be used for his accommodation, is certainly "worldly business," although the acceptor may not negotiate it until Monday, or some subsequent day. The transaction on the part of the indorser, is not the mere writing his name, but includes an authority to the acceptor to negotiate. If the manual act of indorsement is not in itself the performance of "worldly business," it certainly becomes such when coupled with the authority to transfer; and is not the less so, though the authority be verbal, or can only be implied from the indorsement, and intrusting the paper to the acceptor. See *Clough v. Davis*, 9 N. Hamp. R. 500.

It has been repeatedly determined, that a penalty inflicted by statute upon the doing of an act, is equivalent to a prohibition, and a contract relating to it is void. See *Shippey and another v. Eastwood*, 9 Ala. Rep. 198, 200. Under the influence of this rule, it has been decided that a contract made on a Sunday is void, and a security founded on it, is not recoverable at the suit of a party to the illegal consideration. But as the act does not declare that both the contract and security are void, the authorities clearly indicate that a *bona fide* indorsee of negotiable paper, founded upon such a contract, who acquires it before maturity, without notice of the illegality, for value, may enforce its payment. See also as to contracts, &c. made on Sunday, *Pierce v. Hill*, 9 Port. Rep. 151; *O'Donnell v. Sweeny*, 5 Ala. Rep. 467; *Dodson v. Harris*, 10 Ala. Rep. 567; *Butler v. Lee*, 11 Ala. Rep. 885; *Styles v. Smith*, 12 Wend. Rep. 57; *Drury v. DeFontaine*, 1 Taunt. Rep. 131; 56 Law Lib. (top page,) 86; *Smith v. Sparrow*, 4 Bing. Rep. 84; *Williams v. Paul*, 4 M. & P. Rep. 532; *Boynton v. Page*, 13 Wend. R. 425; *Tracy v. Jenks*, 15 Pick. Rep. 465; *Clap v. Smith*, 16 Ib. 250; *Lyon v. Strong*, 6 Verm. Rep. 219; *Fox v. Abel*, 2 Conn. Rep. 541; *Kepner v. Keefer*, 6 Watts Rep. 231; *Northup v. Foot*, 14 Wend. R. 248; *Blaxsome v. Williams*, 3 B. & C. Rep. 232; *Fennell v. Ridler*, 5 B. & C. R. 406; *Myers v. The State*, 1 Conn. Rep. 502; *Story on Con.*, 2d ed 543.

We come now to consider whether the plaintiff is a *bona fide* indorsee, without notice, for value, so as to preclude the defendant from setting up the defence of illegality in the in-

dorsement. By the act of 1834, it is enacted, that "all contracts whatsoever, which may be made, to take directly or indirectly for the loan of any money, &c., above the rate of eight dollars for the forbearance of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time; and all bonds, contracts, covenants, conveyances, or assurances hereafter to be made, for the payment or delivery of any money, &c. so to be lent, on which a higher rate of interest is recieved or taken, shall be void and of no effect for the whole interest only: but the principal sum of money, &c., shall be recoverable upon all bonds, &c." This enactment declares, that the provisions of the act of 1819, so far as they are not repugnant, shall continue in force; consequently the lender who took usury, was still liable to an action at the suit of the borrower or informer, as well as to a prosecution at the instance of the state. These inflictions were the consequences of receiving usury, according to the statute of 1819, and are not inconsistent with the modifying act of 1834, (Clay's Dig. 589 to 591, § 1 to 10;) but they are repealed by an act passed in January, 1845.

The evidence recited in the bill of exceptions abundantly shows, that the bill declared on was given to the plaintiff in substitution and extension of a bill for the same amount, on which he had previously advanced money at a usurious rate of interest to the acceptor. It does not appear that the original transaction was divested of the taint of usury in the renewal of the bill; but it is clearly inferrable that the plaintiff, in extending the time of payment, charged for the indulgence, interest beyond the legal rate. But however this latter hypothesis may be, it is sufficient that the impurity in the inception of the contract, has not been purged, so as to divest the bill of usury. Chit. on Bills, 9th Am. ed. 109; Story on Con. 2d ed. § 601; Wilkes v. Brummer, 2 McC. Rep. 178; Jones v. Jackson, at this term, and citations in opinion.

In Ramsdell and Brown v. Morgan, 16 Wend. Rep. 574, goods fraudulently obtained were deposited with an auctioneer, who made an advance upon them, and charged five per cent. besides the usual commissions: *Held*, that the transaction was *usurious*, and for that reason the auctioneer could

not be considered a *bona fide purchaser*, in an action of *trover*, brought against him by the party from whom the goods were obtained ; although he was wholly innocent of the fraud. It was said by the court, that there was a solecism on the face of the expression, *a bona fide purchaser on usury*: *Further*, "Where the sale of goods appears to the jury to be above all suspicion, we have protected it, notwithstanding the fraud of the vendor in obtaining them, if the fraud come short of a felony. In this we have gone beyond the English cases, which are cautiously restrained to the transfer of negotiable paper, as founded on the paramount interests of commerce. We have also gone beyond them in protecting a holder under a usurious indorsement, so far as to enable him to maintain an action, if there be no other defence against the note. The King's Bench cut off all chance of this kind to evade the statute. *Chapman v. Black*, 2 Barnw. & Ad. Rep. 588, and cases there cited ; *Lloyd v. Keach*, 2 Conn. Rep. 175. We have not yet gone so far as to say that the immediate usurious purchaser is to be protected as a holder in good faith, as coming to the possession in the fair course of trade, and thus save him from all defence as between the original holders. We have, I think, gone far enough in both respects. One who took money on a contract prohibited by statute, was held liable to the true owner in *Clark v. Shee*, Cowp. 197, on the very ground taken here, that such an act cannot be called *bona fide*. *Id.* 200, 201." This reasoning is strikingly appropriate to the case before us, and perfectly defensible, at least, so far as it relates to negotiable paper.

Our statute, we have seen, explicitly declares, that all contracts for the loan of money, &c., by which a higher rate of interest than eight per cent. is reserved, as well as the securities founded upon such contracts, "shall be void and of no effect for the whole interest." Such contracts and securities are against the declared policy of the state, and in violation of law. True, the statute of 1834 does not visit upon the lender consequences so severe as that of 1819, which declared a forfeiture not only of the interest, but the principal also ; and this latter enactment we have seen is still further divested of its harshness by the act of 1845. But under

each, the contract is alike illegal, and the difference in the extent of the penalty, it would seem, is immaterial to the present inquiry.

It is however insisted for the defendant in error, that as usury only avoids the contract and consequent security, to the extent of the interest, it can have no other effect in the present case, than to abate the recovery *pro tanto*; and to sustain this view, *De Wolf v. Johnson*, 10 Wheat. 367, has been pressed upon our attention. In that case, a bill was filed in the federal circuit court of Kentucky, to foreclose a mortgage executed in Rhode Island upon lands situated in the former state, and one of the questions was, whether, as the mortgage was usurious, and the security void as to the interest, according to the statute of Rhode Island, the plaintiff was entitled to a decree for the principal. It was conceded by the court, that chancery would not lend its aid to an illegal or unconscionable bargain—that the law of Rhode Island forbid the contract of loan for a greater interest than six per cent., and so far no court would lend its aid to recover such interest. But as it did not go farther and inhibit the recovery of the principal under any circumstances, the court could not add another to the penalties declared by the law itself, which were the loss of the interest, and a penalty to the amount of the whole interest, and one third of the principal, if sued for within a year. We are unable to perceive the application of this citation to the question we are now considering. There the mortgagor did not resist a decree of foreclosure upon the ground of *usury*, or for any other cause, but the defence was set up by subsequent incumbrancers. The court might very well (as it did) have disallowed the defence, for the reason that the defence of *usury* was personal to the borrower; and he being silent, it is difficult to perceive of any reason, either in law or morals, which would forbid a decree in favor of the mortgagee, to the extent of the principal at least. See *Young v. Scott*, 4 Rand. R. 415; *Turpin v. Powell, et al.* 8 Leigh's Rep. 93; *Campbell v. Patterson*, 11 Leigh's Rep. 113; *Crawford v. Harvey*, 1 Blackf. Rep. 382; *Taylor v. Smith*, 2 Hawks's Rep. 465; *McBrayer v. Roberts*, 2 Dev. Eq. Rep. 75.

It is laid down in general terms, that a statute may either expressly or impliedly prohibit or enjoin an act, and in either case, a contract in violation of its provisions is void. Story on Con. 2d ed., 406, 539, *et post*, and citations in notes; *Roby v. West*, 4 N. Hamp. Rep. 285; *Seidenbender v. Charles*, 4 Sergt. & R. Rep. 159; *Sharpe v. Teese*, 4 Hals. Rep. 352; *Favor v. Philbrick*, 7 N. Hamp. R. 326; *Carleton v. Whitcher*, 5 N. Hamp. 196; *Sharp v. Farmer*, 4 Dev. & Bat. Rep. 122. See also, as to the effect of usury, both at common law and under the statutes, Story on Con. 2d ed. 518, *et post*; *Lloyd v. Scott*, 4 Pet. Rep. 205.

The question is not whether the defendant could defeat a recovery *in toto*, upon the ground of usury, for the statute is explicit, and only avoids the contract as it respects the interest; but it is, whether the holder of negotiable paper, who became such under a usurious contract, is a *bona fide* proprietor in the usual course of business, so as to exempt the paper in his hands from a defence which would have been available against it, as between the original parties. The statement of this question seems to suggest a ready answer. A usurious contract, as we have seen, is violative of the expressed policy of the state, and although it may not be marked by that deep moral stain which was formerly supposed to attach to it, yet it must be considered as illegal or immoral, if for no other reason, because the law prohibits it. These are propositions which are founded in municipal justice, and to a great extent supported by established principles of ethics—they must command universal assent, and do not require the aid of further argument to illustrate them. See *Lloyd v. Scott*, 4 Pet. Rep. 224.

The plaintiff then, who has become the indorsee of the bill, by violating the positive provisions of a statute, cannot with any degree of propriety be said to be a *bona fide* holder in the usual course of trade. An enlightened morality requires a punctillious obedience to the legislation of the country and good faith enjoins an observance of the law in all human transactions. Integrity, in the most extended sense of the term, is the soul of commerce; and if the *usual course of business*, in any community, among any class of men, or in any des-

cription of dealing, would set it at defiance, the law, ever jealous of its purity and dignity, would interpose, and withhold its sanction to a departure from moral and municipal right.

It is insisted by the counsel for the defendant in error, that the prayers for instructions were so framed as to require the court to refer to the jury the determination of legal questions, and for this reason, if no other, their refusal may be justified. We think this argument cannot be supported, at least in respect of all, or most of the charges asked. The prayers, as to the effect of the indorsement of the bill on Sunday, and the usurious contract under which the plaintiff acquired it, seem to be sufficiently explicit, without devolving upon the jury the duties of the judge. They distinctly call upon the court to declare the law, without forestalling or extending the inquiries of the jury.

This view answers the question presented by the bill of exceptions, not previously answered, and shows, that if the plaintiff became the proprietor of the bill upon a usurious loan of money, that he is not a *bona fide* holder in the *regular course of trade*; and therefore the defendant is entitled to any defence which would have availed against the plaintiff, if the latter had been informed of such defence before he became the proprietor of the paper. We have seen, that upon the law of the case, the defendant might have successfully resisted a recovery, if the jury credited the proof adduced; and that the ruling of the circuit court denied the validity of the defence. The judgment is consequently reversed, and the cause remanded.

DARGAN, J., not sitting.

WADDLE v. DUMAS.

1. Neither appeal or *certiorari* will lie from the judgment of a justice of the peace, to the county court, in a suit founded upon a *tort*, when the damages claimed do not exceed \$20. The "superior" court spoken of in the statute, to which the appeal is to be taken, is the circuit court.

Error to the County Court of Fayette.

THE defendant in error brought a suit before a justice of the peace of Fayette county, against the plaintiff in error, to recover damages for false imprisonment. The damages claimed were less than \$20. This suit was brought in the year 1844. The justice dismissed the suit for want of jurisdiction. An execution for costs was issued against the defendant in error; he petitioned the county court of Fayette and obtained a *certiorari*. The petition set forth the fact of the payment of the cost, and prayed a *supersedeas*, and also a *certiorari*, to bring up the judgment. Upon the return of the *certiorari*, the plaintiff in error moved to dismiss it, which motion was overruled, and the county court took jurisdiction of the suit, and rendered a judgment in favor of the defendant in error, for ten dollars. It is here assigned for error, that the motion to dismiss the *certiorari* should have been granted.

COGGIN, for plaintiff in error, cited Bobo and Johnson v. Thompson, 3 S. & P. 385; Wheelock v. Wright, 4 Id. 163.

P. MARTIN, contra.

DARGAN, J.—By the act of 1841, jurisdiction was given to justices of the peace, to try all causes for damages, whether the same resulted from contract or tort, (except in cases of slander,) where the damages claimed do not exceed twenty

dollars ; and by the proviso to the act, either party could appeal from the judgment of the justice to the next superior court of the county.

Before this statute, a justice of the peace could not entertain jurisdiction of a suit founded on a tort. By this statute jurisdiction is given, when the damages do not exceed twenty dollars. But we think the right to appeal to the next superior court of the county, means the circuit, and not the county court, and therefore the power to revise the judgments of justices in suits for torts, does not belong to the county courts, but is confined to the circuit courts. It will follow, that if the defendant in error could not have appealed to the county court, he could not bring the case before that court by *certiorari*. The county court therefore, had no jurisdiction to try this case, brought before it by *certiorari*, and consequently should have dismissed the writ. The judgment of the county court is therefore reversed, and judgment will be here rendered, dismissing the writ of *certiorari*.

THE STATE v. BULLOCK.

1. An indictment need not conform to the exact words of a statute, creating the offence. It is sufficient if the words used in the indictment descriptive of the offence, are equivalent to those used in the statute.
2. An indictment charging that the prisoner, "with a certain large knife, which he then and there had and held, at and against the body of the said H. W. R., then and there did cut, thrust, and stab, with the intent him the said H. W. R. then and there, feloniously, wilfully, and of his malice aforethought, to kill and murder," sufficiently states that the intent to commit the act was by the use of the weapon described.
3. Although drunkenness reduces a man to a state of temporary insanity, it is no excuse for crime which is the immediate result of it. So, upon a trial for an assault with intent to murder, it is not error for the court to

charge the jury, that the drunkenness of the prisoner should have no effect upon their consideration.

Error to the Circuit Court of Shelby County. Before the Hon. G. D. Shortridge.

THE prisoner was indicted in the circuit court of Shelby county, for an assault with intent to kill and murder one Henry W. Robertson. The indictment, after stating the assault made by defendant, in the usual form, proceeds, "that the said James Bullock, with a certain large knife which he the said James then and there had and held, at and against the body of the said Henry W. Robertson, then and there did cut, thrust, and stab, with the intent him, the said Henry W. Robertson, then and there, feloniously, wilfully, and of his malice aforethought, to kill and murder." The defendant was found guilty by the jury, and sentenced by the court to five years' imprisonment in the penitentiary.

It appears, from a bill of exceptions taken upon the trial, that the prisoner, and the person on whom the assault was alledged to have been committed, were both deeply intoxicated at the time of the commission of the offence, with spiritous liquors. The prisoner's counsel asked the court to charge the jury, "that although drunkenness does not incapacitate a man from forming a premeditated design of murder, yet, as drunkenness clouds the understanding and excites passion, it might be evidence of passion only, and of a want of malice and design." This charge, the circuit court refused to give, but charged the jury, that drunkenness could have no effect in their consideration. The prisoner moved to arrest the judgment, alledging defects in the indictment, which motion the court overruled. He then insisted, that the offence charged in the indictment was a common law and not a statutory offence, and that the punishment was fine, and imprisonment in the common jail, and not confinement in the penitentiary, which also being overruled by the court, the prisoner excepted, and now assigns for error—1. The refusal of the court to give the charge asked, and in the

charge given. 2. The refusal of the court to arrest the judgment; and 3. The sentence to the penitentiary.

PECK and BRYSON, for the prisoner, made the following points: 1. The court should have given the charge asked, that although drunkenness does not incapacitate a man from forming a premeditated design to murder, yet as it clouds the understanding, and excites passion, it may be evidence of passion only, and of want of malice and design. *The State v. McFall*, Addison's Rep. 257; *Kelley & Little v. The State*, 3 Smedes & Mar. Miss. R. 518. That drunkenness is distinguished into three kinds—1. Intentional—voluntarily induced in order to the commission of a crime while in that state. 2. Culpable—as drinking without any intention to become drunken, but where the party might easily have foreseen that he would naturally become so. 3. Inculpable—where such consequence would not easily have been foreseen, or the party took due precaution against any such injurious effects, or where the drunkenness was justly attributable to others, or the result of disease. That, in the first, it is no excuse; in the second, it reduces the design of criminality and mitigates the punishment; in the third, the liability to punishment ceases. *Mithemacr on the Effects of Drunkenness on Criminal Responsibility*, § 6, 7, 8, 9. 2 Greenl. Ev. 304.

2. That the indictment was bad, because it did not state the intent to commit the act was by the use of the instrument described. 1 Russell, 557.

3. That the offence charged is not provided for in the penal code, which affixes punishment in the penitentiary as the sentence against any person who shall be guilty of an assault with an attempt to murder, &c. The indictment charges the assault with intent to murder. The two offences are different: intent, means design—attempt, is an actual effort to carry some design into execution. Intent, is a mental, attempt, a physical act. 1 Russell, 552, 553, 555.

NOOR, contra, insisted that drunkenness was no excuse for crime, and that were the law otherwise, the most flagrant breaches of the criminal law might go unpunished under the

cover which it would afford. That the indictment conformed substantially to the requisitions of the statute, and the sentence imposing imprisonment in the penitentiary was consequently correct.

CHILTON, J.—1. Before considering the propriety of the charge asked and refused, and that given, by the court, let us examine as to the sufficiency of the indictment. The statute under which it is framed, declares, “every person who shall be guilty, and be thereof convicted, of an assault with an attempt to murder, &c. shall be punished by imprisonment in the penitentiary, for a term not less than two, nor more than twenty years.” Conceding the law to be well settled, that all penal statutes must be strictly construed, yet it does not follow, that an indictment for a statutable offence should follow the exact wording of the statute. It is in general sufficient that the offence be set forth with substantial accuracy and certainty, to a reasonable intendment. *United States v. Batchelder*, 2 Gallis. 15. Nor will a variance between the language of the statute creating the offence, and the indictment vitiate, if the words used in the indictment are equivalent to those used in the statute. *State v. Hickman*, 3 Halst. 299; 8 Bacon’s Abr. Bonner’s ed. 88.

Applying these principles to the case before us, we think this indictment does substantially charge the offence described in the statute. It is true, as contended for by the counsel for the prisoner, that there is a marked difference between the terms “*intent*” and “*attempt to kill and murder*,” &c. But while this difference exists in the terms taken separately, the distinction is lost, when we consider them in the connection in which they occur in the statute, and in the indictment. An assault implies an attempt to do the violence; and the intent to murder, characterizes the criminality of the act. An assault with an attempt to murder, implies nothing less; so we conclude, the indictment contains a sufficient description of the statutory offence.

2. But it is contended that the indictment does not state that the intent to commit the act, was by the use of the weapon described in it. We regard this objection as untenable. The indictment charges that the prisoner, with a large knife

which he then and there had and held at, and against the body of the said Henry W. Robertson, then and there, did cut, thrust and stab, with the intent then and there feloniously, &c. to kill and murder. It is insisted that the indictment should have read thus: "then and there, and *thereby*, &c. We think such strictness not now required, and that, although the indictment thus framed would accord more nearly with the ancient form, when, according to Lord Hale, such niceties had grown to be a blemish and inconvenience in the law, (2 Hale, 193;) yet the tendency of modern decisions is to overlook technical objections, that the great ends of society may not be defeated in the punishment of those who offend against the law. We think it clear that the indictment is sufficiently certain, and that the circuit judge very properly overruled the motion in arrest of judgment.

3. This brings us to the consideration of the remaining point in this case, which is one of more difficulty—the charge asked by the prisoner's counsel, and refused by the court. The court was asked to charge as a matter of law, that although drunkenness did not incapacitate a man from forming a premeditated design of murder, yet that as drunkenness clouds the understanding, and excites passion, it might be evidence of passion only, and of a want of malice and design." It is a general rule, too well established by an unbroken chain of authority to be now controverted, that although drunkenness reduces a man to a state of temporary insanity, it does not excuse him or palliate his offence committed in a fit of intoxication, and which is the immediate result of it. Lord Coke, in his classification of persons *non compos*, includes him who is drunk, but adds, that he is so far from coming within the protection of the law, that his drunkenness is an aggravation of whatever he does amiss. Co. Lit. 247; Bac. Ab. tit. Idiots and Lunatics, A. This rule, however, which went so far as to deny to the unfortunate inebriate the right to avoid his contracts superinduced by intoxication, has been greatly relaxed by subsequent decisions, more in accordance with the dictates of justice and common sense. 4 Kent, 451. Yet the rule, that drunkenness shall not excuse, or even palliate crime, has not, so far as we are advised, been departed

from. It is insisted by the prisoner's counsel, that although drunkenness does not excuse or justify the offence, yet it may be evidence of passion only, and want of malice. It is certainly true, that there must be malice, either express or implied, to constitute the offence charged in the indictment, and any circumstance calculated to disprove its existence, was proper to be considered by the jury. Malice may be inferred from the deadly character of the weapon used in the commission of the act. Would the legal presumption, deducible from the use of such weapon, be rebutted by the fact that the party was intoxicated? Suppose the prisoner, in a state of intoxication, with a large knife, such as was calculated to produce death, had, without provocation, assaulted and slain his victim, would it, at common law, have been a sufficient plea to an indictment for murder, that he was drunk? If so, then drunkenness would excuse the crime of murder. But we have seen that it is no excuse for crime. If, then, in the present case, had the prisoner killed Robertson with the deadly weapon with which he stabbed him, the crime would not have been reduced from murder to manslaughter by reason of his intoxication, it follows that the court did not err in refusing the charge asked for, and in charging the jury, that the drunkenness of the prisoner (which we must presume, in the absence of proof to the contrary, was voluntary) should not be considered by them. The authorities referred to by the counsel for the prisoner, we apprehend, do not conflict with the views here expressed. In the case of *Pennsylvania v. McFall*, Add. R. 257, the law, as applicable to murder in the first degree, as defined by a statute of that State, is laid down as contended for by the counsel for the prisoner. So, also, in the case of *Swan v. The State*, 4 Humphreys's Tenn. Rep. 136, the point is similarly ruled. In these cases it became important to ascertain whether the homicide was of that "kind of *wilful, deliberate, malicious and premeditated killing*," which, by the provisions of the statute, constituted the crime of murder in the first degree, as contradistinguished from murder in the second degree. The question involved, was the *mental status* at the time of the commission of the act, and with reference to it. Was it one of fixed purpose, by deliberation and pre-

meditation, to take the life of the deceased? The mental state required by the statute to constitute the crime, was one of deliberation and premeditation, hence drunkenness, which excluded such condition of the mind as was necessary to constitute the statutory offence, was allowed to be considered by the jury, not as an excuse for the crime, but to show it had not been committed. Indeed, the court in the last case referred to, assert that drunkenness is no excuse or justification for any crime. Without intending to intimate what would be our decision, should a similar case arise under our statute, which is somewhat similar to those above mentioned, we are satisfied that these decisions do not apply to the case before us. Whether the offence committed, was the result of a pre-conceived determination to kill and murder, or was induced by the voluntary intoxication of the prisoner, he is nevertheless guilty, and must suffer the penalty denounced by the statute against such as violate its provisions.

Let the judgment of the circuit court be affirmed.

· THOMASSON v. BOYD.

1. An infant, ten days before his majority, in the purchase of a note, drew an order on a third person, of the non-payment of which he had notice. Being sued several years after, upon the order, Held, that his omission to return the note, or disaffirm the contract, after he obtained his majority, warranted the implication that he intended to abide by his contract, and countervailed the defence of infancy.

Error to the Circuit Court of Benton. Before the Hon. D. Coleman.

THIS was an action of assumpsit, at the suit of the plaintiff in error, to recover the amount of an order drawn in his favor by the defendant, on Joel D. Hicks, for \$250, under

date of the 5th April, 1841. The cause was tried on the general issue, and an issue to the plea of infancy; a verdict was returned for the defendant, and judgment was rendered accordingly. It appears from a bill of exceptions, that the plaintiff proved the facts *prima facie* sufficient to entitle him to recover; then evidence was adduced tending to prove, that when the order was drawn, the defendant wanted ten days of being twenty-one years of age; that the order was given in part consideration of a note of \$1,000 on one Wright of Mississippi; after the defendant attained his majority, he went to Mississippi to collect the note, but did not then see the maker. The note was not produced at the trial, and there was no proof that the defendant had ever offered to return it, or rescind the contract.

The plaintiff prayed the court to charge the jury, that if the defendant retained the note after he became of age, had never returned or offered to return it, or rescind the contract of purchase, that he cannot now avail himself of the plea of infancy. This charge was refused, and the jury were instructed, that the retention of the note did not of itself amount to a ratification of the contract by which defendant purchased it, but was a circumstance which they might consider in ascertaining whether he intended to ratify it.

S. F. RICE, for the plaintiff in error, contended that the facts established a clear case of the ratification of the contract which the defendant made in his minority, and cited 3 Burr. Rep. 1794; 6 Greenl. Rep. 89; 9 Verm. Rep. 368; 14 Id. 405; 6 Ala. 547; 6 Conn. 494; 9 N. Hamp. R. 436; 10 Id. 194, 220, 561; 11 Wend. R. 85.

W. B. MARTIN, for the defendant in error.

COLLIER, C. J.—An infant may ratify a contract made during his minority, after he becomes of age, as well by his acts as by an express promise. 1 N. Hamp. R. 75; 3 Id. 315; 9 Id. 436; 10 Id. 194. Consequently it has been said, if an infant, after he attains his majority, continues in pos-

session of lands leased to him, or which have been conveyed to him, in both instances he affirms the contract under which he is in possession. *Id.* In *Delano v. Blake*, 11 Wend. Rep. 85, an infant took the note of a third person in payment for work done, retained it for eight months after he came of age, and then offered to return it, and demanded payment for his work. In an action for work and labor done, it was held, that the retaining of the note for such a length of time was a ratification of the contract under which it was received. And an infant may ratify and affirm a negotiable note made by him during infancy. 2 N. Hamp. Rep. 54; 7 *Id.* 372. In *Lawson v. Lovejoy*, 8 Greenl. Rep. 405, an infant purchased a yoke of oxen, and gave a negotiable promissory note in payment; afterwards he sold them and received the proceeds: *Held*, that the conversion taking place after he attained his majority, was a ratification of the contract, and the indorsee was entitled to recover. So where an infant purchased a pot-ash kettle, irons, leaches, &c., and gave his promissory note, it being agreed by the parties that he might try the kettle, and return it, if it did not answer; the vendor, after the infant became of age, requested him to return it, if he did not intend to keep it; but he retained and used it, with the other property, a month or two afterwards: *Held*, that this was a ratification of the entire contract, and that an action might be sustained on the note. 10 N. Hamp. Rep. 194. See also, 4 Mass. Rep. 502; 6 Ala. R. 544.

In the case at bar, the defendant, after he attained his majority, went to Mississippi to demand payment of the note which he purchased from the defendant, and for which he gave the order declared on; he received notice of the non-payment of the order, and though years have elapsed, has never offered to return the note, or disaffirm the contract. These acts and omissions warrant the implication, that the defendant intended to abide by his undertaking; and they are quite sufficient, in the absence of any thing to counter-vail their effect, to establish an affirmation of the contract, and take away the defence of infancy. The circuit court having laid down the law differently, its judgment is reversed and the cause remanded.

BEZZELL, ADM'R, v. WHITE.

1. When one surety sues a co-surety for contribution, for money paid by the former, for the principal debtor, the latter may show, that the surety suing for contribution was indebted to the principal debtor, in a larger amount than he was compelled as surety to pay for the principal, and defeat the right to contribution.

Error from the Circuit Court of Greene. Before the Hon. J. D. Phelan.

THE defendant in error declared in assumpsit against the plaintiff, as administrator of William Bezzell, deceased ; a trial was had, and a verdict returned in favor of the plaintiff below, whereupon judgment was rendered. On the trial a bill of exceptions was sealed by the presiding judge, which presents the following facts : The plaintiff, Philip Beazley, Hartwell, Murphy, Gibson, and the defendant's intestate, were the securities of one Gully, as sheriff of Greene county, and that as such, the plaintiff, Beazley, Hartwell and Murphy, had paid \$850 each, for the default of Gully, as sheriff. That Gully and Gibson, one of the securities, were insolvent ; and this suit is brought against Bezzell, as the administrator of William Bezzell, to compel contribution from him, as a joint security. The defendant offered to prove, that the plaintiff was indebted to Gully, for money advanced by said Gully for White, and at his request, to a larger amount than White had paid as the security of Gully, and that on a settlement between White and Gully, White would still be in debt to Gully. The court rejected this testimony, on the ground, that if true, it would be no defence to this action.

GRAHAM and HALE, for the plaintiff in error, made the following points :

1. A surety compelled by action at law to pay the debt of his principal, who, at the time of the payment so made by

him, was indebted to his principal in a sum greater than he was required to pay, cannot compel his co-sureties to contribute. Pitman on Principal and Surety, 40 L. Lib. M. P. 153; 2 Moll. 31; Fitzpatrick's adm'r v. Hill, 9 Ala. 786; Low v. Smart, 5 N. Hamp. R. 353.

2. The courts have gone no further than to say, that a surety is not required to sue his principal, or show his insolvency, before he can sustain an action for contribution. Roberts v. Adams, 6 Porter, 361; Cave, use of Wallace v. Burns, 6 Ala. 780; Cowell v. Cowell, 2 Bos. & Pul. 268.

DARGAN, J.—The law is well settled, that a surety paying the debt of the principal, can compel contribution in this form of action. This right to contribution, it is said, does not arise from contract, but springs from a principle of equity, that those who have a common burthen to bear, should contribute equally, and the whole burthen ought not to fall on one. See 2 Bos. & Pull. 270; 14 Ves. 35, 160; also, 9 Ala. Rep. 787.

If the right to contribution results from an equity, that each surety should bear his part of a common burthen, it surely ought to be rebutted by proof that no such equity exists in the particular case. In this case, if White were to sue Gully, the principal, for money paid, &c., and Gully could prove that White was indebted to him in a larger amount, for money advanced, White could not recover. What equity then, can there be in permitting White to recover of his co-security, for money paid, when he could not recover of his principal? And as this suit must be maintained upon a principle of equity, we think any proof that will clearly rebut this equity, or show that *ex equo et bona*, the plaintiff ought not to recover, is admissible.

The court erred in rejecting this proof, and the cause is reversed and remanded.

BOYD v. TALIAFERRO.

1. B, An indorser on a bill of exchange, paid the amount to the bank, upon an agreement, that the bank should prosecute their claim against T, a subsequent indorser, for the benefit of B, but the agreement was not to appear on the books of the bank. The bank obtained judgment against T, who was ignorant of the payment by B, collected the money, and paid it over to B. Held, that T could recover the amount so paid, of B, in an action of assumpsit.

Error from the Circuit Court of Montgomery. Before the Hon. Geo. Goldthwaite.

ASSUMPSIT by Taliaferro, against the plaintiff in error, to recover the amount which the plaintiff below had been compelled to pay by suit, as indorsee of a bill of exchange upon which Boyd was a prior indorser.

It appeared in evidence, that before the payment made by Taliaferro, Boyd had paid the amount of the bill to the Branch of the Bank of the State of Alabama at Montgomery, but under an agreement, that the payment should not be entered upon the books of the bank, and that the bank should prosecute the claim against Taliaferro's estate, (he having died in the mean time,) for the benefit of Boyd. The claim was prosecuted, judgment rendered, and the money collected by the sheriff of Montgomery county, and paid over to Boyd upon the order of the bank. There was no evidence showing that Taliaferro had any knowledge, before the payment of the money by him, of the previous payment made by Boyd, the first indorser.

The court charged the jury, if they found the above state of facts to be true, they should find for the plaintiff below. To reverse the judgment because of this charge, Boyd prosecutes this writ of error.

ELMORE and McLESTER, for the plaintiff in error, made the following points :

1. The money sued for, was not, in law, paid to the plaintiff in error, but was paid to the bank, upon a valid judgment.

2. There is no right of action in defendant against Boyd, for Boyd had paid the debt to the bank before the judgment was rendered against defendant, and of this he was bound to take notice and plead it.

3. The defendant has no remedy at law, nor can he be relieved in equity, unless he can impeach the judgment for fraud or accident, or the act of the opposite party, unmixed with fault or negligence on his part. *French v. Garner*, 7 Por. 549.

4. If the defendant has any remedy, it is against the bank, for Boyd received the money to the use of the bank. *Bank U. S. v. Bank of Washington*, 6 Pet. 8; *Story on Agency*, 303-4-5.

5. If the payment was made to Boyd, and not to the bank, it was a voluntary payment, and hence defendant could not recover it back.

6. If the last indorser of a bill be notified of its dishonor, and he desires to hold any prior party liable to him, he must notify him, unless due notice has been given to the prior party by the holder. *Sherrod v. Rhodes*, 5 Ala. 683.

J. D. F. WILLIAMS, for defendant.

1. The action of assumpsit for money had and received, has been assimilated to a bill in equity, and the true test of the plaintiff's right to recover, depends upon the fact, whether the defendant can, in equity and good conscience, retain the money sought to be recovered. *Dupuy v. Roebuck*, 7 Ala. 486.

2. These actions on the money counts are resorted to as substitutes for bills in equity, and ought to be encouraged, whenever the law affords no other remedy ; and where a court of equity would compel the defendant to repay the plaintiff a sum of money, which the latter had been compelled to pay for his benefit. *Wright v. Butler*, 6 Wend. 290.

3. This action will also lie by a second indorser against the holder of a promissory note, to recover back money paid on a judgment against such indorser, where the holder, previous to the payment, released a prior indorser. *Brown v. Williams*, 4 Wend. 360; *Knox v. Abercrombie*, 11 Ala. R. 997.

4. An action of assumpsit on the money counts, will lie by the second indorser against the first indorser, to recover back money paid upon a judgment. *Wright v. Butler*, 6 Wend. 284; *Brown v. Williams*, 4 Ib. 366.

CHILTON, J.—This case is entirely unlike the case of *The Trustees of the University of Alabama v. Keller, Ex'x*, 1 Ala. Rep. 406, in which it is held, that money *voluntarily* paid, under ignorance of the law, cannot be recovered back in an action for money had and received. Nor does it come within the rule, that a defendant in a judgment cannot recover from the plaintiff such monies as the latter has recovered by virtue of the judgment, so long as such judgment remains in full force. This is a suit by the second indorser of a bill, to recover from a prior indorser, the amount which has been collected from him by law. There can be no doubt but that the payment of the bill by Boyd to the bank, could have been pleaded by Taliaferro in bar of the action of the bank against him. But he is unadvised of this payment, and the means of ascertaining it are withheld from him, virtually, by the agreement between Boyd and the bank; for it appears by this agreement, the payment is not to be entered upon the books of the bank. Why, it may be asked, was it not to be entered? The reason is obvious, if entered, the second indorser of the bill, Taliaferro, would then have had the means of being informed of the payment, and would have availed himself of it. Taliaferro then, having been compelled to pay the bill, which both Boyd and the bank agreed should not be considered as paid by the arrangement between them, has a right to recover out of Boyd, and the latter cannot be permitted to avail himself of his own wrong to defeat such recovery. The action of assumpsit has well

been assimilated to a bill in equity, in its application to many cases. This is one of those cases, where, according to both conscience and law, the plaintiff should have his remedy. See Dupuy v. Roebuck, 7 Ala. R. 486; Knox v. Abercrombie, 11 Ib. 997. The court, as we have seen, did not mistake the law in the charge excepted to.

Let the judgment be affirmed.

BRANCH BANK AT MONTGOMERY v. WADE.

1. The assets of an estate in the hands of an administrator, cannot be sold by execution for the payment of his debts, although he has made no return of the property levied on, and may be guilty of a devastavit, if he has not actually converted the property to his own use.
2. The possession and use of the property, by the administrator, is not evidence of a conversion, the administrator having married the widow of the intestate, and there being children of the former marriage in their minority.

Error to the Circuit Court of Benton. Before the Hon. G. W. Lane.

A writ of *fiery facias* issued from the circuit court of Montgomery, against the goods and chattels, &c. of A. P. Wade and another, which was levied on a male slave, named Sampson. The defendant in error made an affidavit pursuant to the statute, declaring that the slave in question belonged to the estate of William Johnson, deceased, of which he was the administrator, and executed a bond with surety to try the right. An issue was made up and submitted to a jury, who returned a verdict for the claimant, and judgment was thereon rendered.

From a bill of exceptions sealed at the plaintiff's instance,

it appears that the slave levied on, was in the possession of the defendant in execution at the time of the levy, and that the claimant and defendant were the same person. The slave was the property of Wm. Johnson, deceased, at the time of his death; that the claimant administered on decedent's estate, about ten years previous to the trial, in Benton county, and took possession of Sampson shortly thereafter. The intestate left four or five children, who were still in their minority. Since the grant of administration, the claimant has employed the slave in his own service, and received and enjoyed the proceeds of his labor for almost ten years. The slave is of the value of six or seven hundred dollars, and has never been reported by the claimant to the orphans' court, as part of the intestate's estate. Claimant still continues to be administrator, but he has not made a settlement of the estate.

The court charged the jury, if they believed the evidence they ought to find for the claimant; and thereupon the plaintiff excepted, &c.

A. J. WALKER, for the plaintiff in error, insisted, that the failure to return the slave to the orphans' court, as part of the intestate's estate, and his employment by the claimant, and receipt of the profits of his labor, made him liable to the claimant's creditors. Clay's Dig. 225, § 26; 7 Ala. R. 906. The proof was too uncertain to justify the charge that was given. 10 Ala. 346, 999.

S. F. RICE, for the defendant in error. The intestate's estate cannot be subjected to the payment of the individual debts of the administrator. 4 Ala. Rep. 444; 5 Id. 192; 6 Id. 399. In such case the administrator may interpose a claim in his representative character. 3 Bibb's Rep. 510; 8 Port. Rep. 574. Until distribution of the estate is made, it remains with the administrator. 10 Ala. Rep. 630. The omission to return the slave as assets to the orphans' court, is not a conversion, which makes him liable to the administrator's individual debts. 11 Ala. 1023.

COLLIER, C. J.—It is supposed by the plaintiff in error, that the case of *Williamson v. The Branch Bank at Mobile*, 7 Ala. Rep. 906, is decisive of the present. It was there held, that as between the executor and his immediate creditor, assets of the testator may be seized and sold under execution, whenever there has been a *devastavit*, or where the executor has so dealt with the assets as to be responsible for a *devastavit*, or has used them in a manner inconsistent with his trust. But where an executor holds assets in accordance with the trust of the will, he may prevent a sale of them, when levied on for his own debts, by interposing a claim under the statute, and possibly by a bill in equity. It has however been decided, that until an order has been made distributing the estate of an intestate, the legal title must remain in the administrator, no matter where the possession may be. 10 Ala. 630.

The act of 1821, directs that executors and administrators, within three months after their appointment, shall return to the clerk's office a full inventory of the goods and chattels, &c. which have come to their possession, or knowledge, setting forth the times at which debts are due, &c. *Further*, "inventories and accounts of sales shall be subscribed and sworn to by the executor or administrator returning the same, before the judge, clerk, or some justice of the peace." Clay's Dig. 225, § 26. By a statute passed in 1809, it is enacted, that it shall not be lawful for any executor or administrator to take the estate, or any part thereof, of any testator or intestate, at the appraised value, or to dispose of the same at private sale, except where the same is directed by the will of the testator; but where it shall be necessary to sell the whole or any part of the personal estate, an order shall be obtained from the orphans' court, and the sale shall be public. Clay's Dig. 223, § 13.

The case of *Williamson v. The B. B'k at Mobile*, I incline to think is very well supported by English adjudications, under the influence of a system which gives to an executor or administrator more enlarged powers and discretion. I however doubted whether those decisions could be applied in this state, where the authority of the personal representative was defined, and so much restricted by legislation; conse-

quently I rested my concurrence in the case referred to upon grounds independent of the point noticed. While both of my then learned associates thought the English decisions applicable, one of them delivered an opinion in harmony with mine on other points; so that it may perhaps be questioned whether what was said in respect to the estate of a testator becoming liable to the creditors of the executor upon the *devastavit* of the latter is *res adjudicata*. Be this however as it may, we are satisfied that the facts of the case at bar, do not bring it within the principle of that decision.

The administrator, we have seen, is prohibited from taking the estate of the intestate, at its appraised value, or selling it otherwise than at public sale, and then only under the order of the orphans' court. The question might be asked, whether, under this modification of the law, the administrator could convert the estate of his intestate for the benefit of himself or creditors, or to the prejudice of the creditors and distributees of the intestate? But we waive the point, since it is clear that no *devastavit* which does not amount to an actual conversion, can give to the creditors of the administrator any rights.

True, the administrator failed to return the slave in his inventory, yet this omission to do what the statute enjoins, cannot change the *status* of the property, or impair the rights of creditors or distributees. If any *devastavit* can have that effect, it must be one which amounts to an *actual conversion*. Here there is no predicate from which a conversion can be inferred. The administrator married the widow of his intestate, who was the mother of four or five children of her former marriage, who are still in their minority. If the children have no guardians appointed by law, and no distribution has been made, where else can the possession of their father's estate so properly remain as with their mother and her present husband. The failure to make a final settlement, and the receipts of the profits of the labor of the slaves, is not a conversion in fact. It may be that the claimant supports and educates the children, and thus they become his debtors; if this be not so, he will be bound to pay them what they are entitled to.

In addition to this, it may be asked, if it would not be un-

just to the sureties of an administrator to allow the estate of the intestate to be appropriated to the payment of the debts of the administrator, where there has not been an *actual conversion*, though in point of law, there may have been a *devastavit*.

We think the proof very clearly establishes, that the slave was not liable to the execution ; and consequently, the charge of the court is unobjectionable. The judgment is therefore affirmed.

BRANCH BANK AT MOBILE v. FORD.

1. A return of satisfaction, upon an execution made by the sheriff, by the directions of the plaintiff's agent, precludes the plaintiff from issuing another execution, upon the judgment, whilst the return continues in force, and discharges the *lien* of the execution, as against a purchaser from the defendant in execution, who bought *prior* to the return being made.

Writ of Error to the Circuit Court of Perry. Before the Hon. J. D. Phelan.

ON the first day of October, 1846, a writ of execution, in favor of the bank, against James M. Harwood, William Ford, and Ennis Ford, defendants, was placed in the hands of the sheriff of Perry county, for \$290 05, issued on a judgment rendered in the county court of Mobile, on the 17th of February, 1840. This *fi. fa.* was indorsed thus: "The judgment in this case is satisfied, as per David Chandler's receipt, lodged with me, dated 13th April, 1841. The sheriff will return this, for the branch bank will rule the sheriff, D. Chandler. Nov. the 3d, 1846. HUGH DAVIS, Bank Att'y."

That the sheriff of Perry returned this *fi. fa.* as directed on the 4th day of November, 1846. The receipt of Chan-

dlar bore date when no valid execution was in his hands, nor any authority to receive the money on the judgment. Another execution was issued, on the same judgment, and came to the hands of the sheriff of Perry county, on the 23d November, 1846, which was levied on lands of Ennis Ford. This execution was returned without a sale of said land, to the February term of the county court, 1847. A *venditioni exponas* came to the sheriff's hands, on the first day of March, 1847, which was returnable to the second Monday of June; and on the 21st day of August, 1847, another *fi. fa.* was issued on the same judgment, which, on the — day of October, 1847, was levied on the slave claimed by the claimant, Ford. No execution was issued returnable to the June term of the county court, 1847, except the *venditioni exponas*. The claimant purchased the slave of Ennis Ford, on the 28th October, 1846, for a full and fair price, received a bill of sale for him, took possession, and retained that possession until the levy. The *bona fides* of the sale from Ennis Ford to Benjamin Ford, were admitted. These facts were all admitted, and the question of law submitted to the court, with an agreement, that a verdict and judgment should be entered, in conformity with the opinion of the court. The court decided the law in favor of the claimant Ford; whereupon, a verdict and judgment were rendered.

The bank here assigns as error, that the judgment of the court on the facts agreed, should have been for the plaintiff.

DAVIS, for plaintiff in error.

The questions are—1. Was the *lien* continued by the issuance of the *venditioni exponas* in the form thereof shown in the transcript.

2. Does the defendant, by his purchase, while the plaintiff's execution bound the slave, acquire a good title to the slave, by reason of the neglect to issue a *fi. fa.* as well as a *venditioni exponas*, between February and May terms of the court in 1847? Bacon's Abrid. Execution; Collingsworth v. Horn, 3 Stew. —; 5 Ala. 59.

GARROTT, contra.

DARGAN, J.—The rule is so well established, that a claimant of property cannot be permitted to question the propriety of the judgment, or the regularity of the execution, that it is unnecessary to refer to the numerous decisions in support of it. A claimant shall not be permitted even to show the satisfaction of the judgment. But I understand this rule to be limited to this extent, that the claimant shall not sustain his claim by showing such defects or irregularities. In the case at bar, the title of the claimant is older than the *lien* of the plaintiff; unless the plaintiff can show, that his *lien* is older than the date of his execution, or the time when it came to the hands of the sheriff. If we look, therefore, to the date of claimant's purchase, and to the execution only, the property is not liable to the execution; the sale is admitted to be *bona fide*. The plaintiff, then, must show that his *lien* he is seeking to enforce, has an older origin than the claimant's purchase: he must show a valid subsisting *lien* against the slave, at the time of the sale from the defendant in execution, to the claimant. The claimant has the right to controvert the existence of this *lien*, or to show that it has been lost. If this is not the law, then the trial of the right of property can never protect a purchaser from the defendant in execution, although the judgment may be ten years old, or the *lien* expressly abandoned. But all will admit, that if the title of the purchaser is older than the execution levied on the property, it is necessary that the plaintiff should go back, and show that he is prosecuting a *lien*, older than the claimant's title; and if his proof should not show a valid *lien*, older than his title, he must fail. So, if his proof shows that his *lien* is lost.

The return made by the sheriff, on the execution delivered to him on the third of October, 1846, under the directions of the bank attorney, is this: "The sheriff will return this execution, as the judgment is satisfied on which it issued, as per D. Chandler's receipt lodged with me, dated first April, 1841. The branch bank will rule the sheriff." This return was made on the fourth November, 1846. The title of the claimant bears date 28th October, 1846. What is the effect of this return? In the case of *Haden v. Walker*, 5 Ala. Rep.

89, the return was, "the defendant in this case has settled with the plaintiff's attorney, as per his receipt;" and this court held this to be a return of satisfaction. The return in the case now before the court, must also be considered as a return of satisfaction. The execution, then, returned the fourth of November, 1846, is satisfied. Although this return was made under a mistake, yet it is well settled, that after it is made, an *alias* execution cannot be legally issued, without some action of the court amending the return, or setting it aside. See 1 Porter's Rep. 30; 5 Ala. Rep. 89. No action of the court has ever been had, to correct this return, and so far as the facts agreed show, it is still standing as the return. Can the *lien* of the execution *continue*, after the right to issue an execution is gone? That is, can it continue, so as to defeat a *bona fide* purchaser? An injunction bond discharges the *lien*; so does a writ of error bond; or if the plaintiff enter into a contract with the defendant, by which the right to issue execution is lost, the *lien* is lost with it. A *lien* is said not to be a title in, or to the thing, bound by it; but a mere right to *subject the goods* to the payment of the debt. From its very nature, when the right to subject the thing to the payment of the debt is gone, and the *lien* is this mere right, of course the *lien* is gone.

We therefore come to the conclusion, that the plaintiff has failed to show an older *lien* than the title of the claimant, and consequently, the property is not subject to the execution, for it can only be subject to the execution, by showing, that the plaintiff was seeking by his execution, to enforce a *lien* older than the plaintiff's title. The judgment of the circuit court is therefore affirmed.

KING v. SHACKLEFORD.

1. One executor, who is also a creditor of the estate he represents, may file his petition in the orphans' court, and compel a settlement and distribution of the estate, his co-executor having assets for which he fails to account.
2. There is no statute in this state authorizing the transfer of a cause from the orphans' court to the circuit court, and an order making such transfer is a nullity; and if the orphans' court, influenced by such order, repudiates the jurisdiction of the cause, and dismisses it, the judgment is erroneous.

Error to the Orphans' Court of Shelby.

THE plaintiff in error filed his petition in the orphans' court of Shelby county, alledging, among other things, that he and the defendant became executors of one Mason, deceased. That at a sale of the effects of Mason's estate, one Ferrill purchased a portion of the same, and gave his note payable to the executors, with Shackelford, the defendant as security. The petition further avers that said plaintiff is a creditor of the said estate; that Ferrill is insolvent; that Shackelford refuses to account and pay said sum due from him. The plaintiff tendered an account, so far as his action as executor was concerned, and prayed the court, as a creditor, for final settlement of the estate. The petition was dismissed by the court, upon the ground that the judge of the court, who preceded the present judge, having been of counsel, an order was made transferring the cause to the circuit court of Shelby county.

The dismissal of the petition is assigned as error.

MORRIS, for the plaintiff in error.

RICE, contra.

CHILTON, J.—In *Childress v. Childress*, 3 Ala. R. 752, it is decided, that an executor who purchases the property

of the estate, is, after the expiration of the term of credit, chargeable with the amount due, as so much money in his hands. So also, in the final settlement of the accounts of an administrator, he is chargeable with a debt due from himself to the decedent, although he may have been insolvent when the administration was committed to him, and continues so. *Purdom v. Tipton, et al.* 9 Ala. Rep. 914. The principles settled by the above cases will charge the defendant in error with the amount of the note of Ferrill, for the payment of which he became bound as security. It is objected, however, that King being co-executor with Shackelford, is not authorized to proceed as a creditor under the statute, and have a final settlement of the estate, so as to obtain his distributive share. It is clear that he has no remedy by suit at law to collect the note. This point was settled in the case of *Chandler v. Shahan*, 7 Ala. Rep. 251. Upon a similar statement of the facts in a bill in chancery, this court has decided he has no relief in equity. See *King v. Shackelford*, 6 Ala. Rep. 423. If then he has no relief by the proceedings instituted, he is clearly without remedy. We think the statute embraces the case, and that King has a right to have final settlement enforced, as a creditor, and distribution decreed him. He proceeds as a creditor of the estate, not as executor, and as such creditor, he is entitled to share the funds in defendant's hands.

There is no objection to the form of the petition brought to our notice. Allowing it to be in due form, the only remaining question is, did the court, for the reasons assigned, properly dismiss it, and repudiate the cause? There is no statute authorizing the orphans' court to transfer a cause for any purpose, to the circuit court; a mode entirely different is prescribed by the statute. Clay's Dig. 298, § 9; 305, § 46. The circuit court had no jurisdiction of the cause, and the order of the orphans' court, transferring it to that court, was a nullity.

It is contended by defendant's counsel, however, that the order of transfer was not the only evidence before the orphans' court, and that as it is recited in the judgment entry, "that the court, for sufficient cause appearing to it," dismisses the petition, &c., we must, in order to maintain the

judgment, intend the court acted upon sufficient evidence. This argument would be plausible, had not the judgment entry informed us the reason why the petition was dismissed. It is there stated, "that this (the orphans') court has no jurisdiction of said estate of said Job Mason, deceased, having parted with its jurisdiction by its previous transfer thereof to the circuit court of Shelby county, Alabama." This is conclusive to show, that the court, whatever other reasons it may have had for dismissing the petition, was very erroneously influenced to do so by the order referred to.

We think the case of *King v. Shackleford*, in 6 Ala. Rep. 423, indicates the remedy to be in the orphans' court, and as that court has not parted with its jurisdiction by the order referred to, as erroneously supposed by the judge, its judgment is reversed, and the cause remanded, that the appropriate steps may be taken for the settlement of the estate.

CARLTON, v. FELLOWS, READ & CO.

1. Evidence of a parol agreement, cotemporaneous with an indorsement of a bond, that the indorsee should take other steps to collect the bond from the obligors, than the indorsement contemplated, and that they had performed the agreement, and that subsequently the indorser had recognized the agreement, and advised the continuance of the steps they had taken to collect the bond, is inadmissible, as it contradicts the legal effect of the indorsement.

Writ of Error to the Circuit Court of Sumter. Before the Hon. S. Chapman.

THIS was an action of assumpsit at the suit of the defendants in error against the plaintiff, as the surviving partner of W. Carlton & Co. The declaration alleges that Samuel B. Lacey and Austin Lacey, made a bill single, particularly des-

cribed, payable to Henry McCall, which the payee indorsed to Messrs. Carlton & Co., and the latter to the plaintiffs. On the trial before the jury, the plaintiffs proposed to prove that simultaneously with the indorsement to them, it was agreed between the defendant and themselves, that they should take other steps to collect the bill single of the obligors, than the mere indorsement of the paper contemplated, and that they had performed the agreement on their part. *Further*, while they were thus endeavoring to enforce a collection against the makers, though perhaps after the defendant would have been discharged according to the law operating upon the indorsement, the defendant recognized his agreement, and told the plaintiff's attorney to continue to pursue the steps he had adopted, and try to make the money of Austin Lacey, (who was the only solvent maker,) in that way. To the admission of the evidence, either of the agreement or its recognition, the defendant objected, but his objection was overruled, and the testimony permitted to go to the jury. Thereupon the defendant excepted; and a verdict and judgment were rendered for the plaintiffs.

REAVIS, for the plaintiff in error, cited 3 Stew. Rep. 371; 8 Ala. Rep. 247.

M. I. HORT, for the defendant in error, cited Clay's Dig. 333, § 12, 14; 381, § 6; 2 Wash. 219; 1 Por. Rep. 359; 2 Id. 456; 6 Id. 428; 7 Id. 175; Minor's Rep. 173; 1 Ala. Rep. 159.

COLLIER, C. J.—In *Sommerville v. Stephenson*, 3 Stew. Rep. 271, it was held, that the contract evidenced by the general indorsement of a specialty, has a specific legal import, and cannot be varied by parol evidence; that its effect in law is precisely the same, as if it had been expressed *in totidem verbis*, in the written transfer of the paper. To the same effect are Minor's Rep. 357; 2 Porter's Rep. 308; 8 Ala. R. 247; 3 Camp. Rep. 57; 8 Taunt. Rep. 92. These citations are quite sufficient to show that the indorsement could not have been varied in its effect by the verbal agreement simultaneously made; and we think the subsequent recognition of

this agreement, cannot impart to it a validity which it did not originally possess. It was certainly competent for the indorsers to have agreed with the plaintiffs by word merely, after the latter became the proprietors of the paper, that they should not be required to sue the makers at all, or with the promptness required by the statute. But we do not understand the recognition to be a new contract. It was nothing more than an acknowledgement of the previous agreement, an encouragement to the plaintiffs to proceed under it, and an expression of confidence that a collection might thus be made of one of the makers of the bill single. In all this, there is no ground to infer that the defendant was influenced by other than honest motives, or intended to lull the plaintiffs into a false security. *Besides*, it is fairly inferable from the facts recited in the bill of exceptions, that the plaintiffs had lost their recourse upon the defendant before the latter even recognized the agreement; for it is explicitly stated, that a writ issued against the solvent maker, (who lived in Mississippi,) had been returned to the county court of Sumter, "not found." The duty devolved upon the plaintiffs as indorsees merely, required that they should have taken prompt measures against the makers, in the state in which they resided, when the indorsement was made. This it is not pretended was done, and it is more than questionable whether so much time had not elapsed when the writ was returned, as to put it out of the plaintiffs' power to institute proceedings in Mississippi, so as to charge the defendant. The acknowledgement of the invalid agreement cannot be regarded as a promise to pay, and supersede the necessity of showing that the plaintiffs had taken the legal steps to fix the liability of the defendant. We have said that there is nothing in the conduct of the defendant of which a legal fraud may be predicated; and if there was, it might be asked if the plaintiffs could avail themselves of it in this form of action.

The ruling of the circuit court is incompatible with the view we have taken of the law—its judgment is therefore reversed and the cause remanded.

DONNELL v. THOMPSON.

1. A general objection to the reading of a deposition, as evidence, will not authorize the raising particular objections to it, in the appellate court. The objection must be specifically raised in the primary court.
2. It is competent for one, who hands a note to another for collection, to prove his own declarations made at the time, showing his ownership of the note.
3. Possession of a note, is *prima facie* evidence of ownership, in an action of trover by him, against one who shows no title to it.
4. The collection of a note, by one not entitled to it, is evidence of a conversion, and renders a demand unnecessary.
5. A purchaser of a note, payable to C, or bearer, from one who was not the payee of the note, and had not the right to dispose of it, cannot defend against the true owner of the note, by proving he gave value for it.
6. Where the rejection of a deposition, cannot, according to the rules of law, work any injury to the party offering it, its improper rejection, will not be an error for which the judgment will be reversed.

Writ of Error to the Circuit Court of Montgomery. Before the Hon. G. D. Shortridge.

THIS was an action of trover, brought by the defendant in error, against the plaintiff, to recover damages, for the conversion of a promissory note, executed by A. Martin, to Mrs. Amanda Converse, or bearer, for \$125. The declaration described the note as dated the 24th December, 1843, and due January, 1845. It does not appear that the note was indorsed by the payee. To prove property in the plaintiff, the deposition of Jesse Thompson was read, who stated that he received the note from Drury Thompson, who requested him to send it to Montgomery for collection. That the note was handed to the witness, by the plaintiff, as his own property.

The witness described the note, as dated the 26th December, 1843, and due January, 1845. The defendant moved the court to exclude this evidence, on the ground, that it was not evidence of ownership; and on the further ground, that the declarations of the plaintiff, cannot be given in evidence

in his own favor. There was also evidence, that the defendant had collected the money by suit, in the name of the payee for his use. That the money was collected since this suit was brought. There was also proof of a demand made by the attorney of the plaintiff, before this suit was brought, but the demand improperly described the note.

The defendant offered to read as evidence, the deposition of one Shaw, who stated, that he received the note from Jesse Thompson, who was his partner, with instructions to collect it, and apply it to the uses of the firm. That not being able to collect, he received further instructions from Jesse Thompson, to raise money on it, and to appropriate the money to the purposes of the firm. That he then sold said note to the defendant Donnell. To the introduction of this evidence, the plaintiff objected, because the witness was interested. This objection was sustained. The defendant then offered to show, that the witness had been released by him, before he was examined, but the release described the note as payable to Mrs. Battell. It was admitted that Mrs. Converse had once borne the name of Mrs. Battell, but had intermarried with Wm. P. Converse, and that it was a mistake in the release, in describing the note as payable to Mrs. Battell; and then offered to read the deposition, which was objected to; the objection was sustained, and the plaintiff excepted.

The plaintiff in error then requested the court to charge the jury—

1. That the note sued for, being payable to bearer, if it came fairly into the hands of the defendant, for a valuable consideration, that the plaintiff could not recover.

2. That the possession of the note payable to bearer, being *prima facie* evidence of ownership, before the plaintiff can recover, he must show that the defendant had notice of his claim, before his purchase, or fraud on the part of the defendant in obtaining it.

3. That if Shaw had the authority to collect the note, from the maker, that he necessarily had the authority to transfer it to any one for value.

4. That if the plaintiff parted with the possession of the

note, for the purpose of collecting it, it was necessary to show a demand, and that a conversion by Shaw, will not authorize a recovery without a demand of the note from the defendant.

5. That under the evidence, the plaintiff could not recover.

All of which requests were refused, and the bill of exceptions, with all the matters arising therein, is assigned for error.

WILLIAMS, for the plaintiff in error.

1. The only testimony tending to show property in the plaintiff below, is the evidence of Jesse Thompson, and the note of which he speaks is dated December 26, 1843, when the note declared on is dated December 24, 1843.

2. The note which was the cause of action, is payable to bearer, and not being indorsed by the payee, is under our statute, *prima facie*, the property of the payee; and to rebut this presumption, positive proof on the part of the plaintiff is necessary. Clay's Dig. 326, § 76.

3. Before the plaintiff can resort to this remedy, there must have been a conversion by defendant, or a demand by plaintiff. Glaze v. McMillion, 7 Porter, 281.

4. There was not conversion by Donnell until after demand and refusal, because he obtained possession of the note innocently; even though he may have purchased it from a thief. Glaze v. McMillion, 7 Porter, 282.

5. The demand made by Rush Elmore, Esq. was equivalent to no demand at all. He demanded a note dated December 26, 1845, while the note declared on was dated December 24, 1843.

6. Shaw was a competent witness for either party, because his interest was equally balanced. He was liable to the plaintiff below for a conversion of the note, and to the defendant for fraudulent representation. 1 Greenleaf's Ev. 464, § 420.

7. If Shaw's liability preponderated in favor of Donnell, that liability was cured, by the release. 1 Greenleaf's Ev. 472, § 426.

ELMORE, contra.

1. The assignment of error differs from the exception,

which was, "that the declarations of the plaintiff cannot be given in evidence in his own favor." The not making the objection on the ground now assigned, and making it on others, was a waiver of this ground. But if not a waiver, it is covered by the case of *Anderson v. Snow & Co.* 9 Ala. 247.

2. The second assignment is answered by the principle, that the declarations of a party at the time of the act, or while in possession of property, and in regard to the act or title of the property, is evidence in his favor. *Gary v. Terrell*, 9 Ala. 202; *Yarborough v. Moss*, *Ib.* 382. But the objection was to the whole of *Jesse Thompson's* evidence set out in the bill of exceptions, and was not confined to the declarations of the plaintiff.

3. The third assignment of error, and those arising under the charges refused, are answered by the following propositions: 1. Two things only are necessary to be proved, to recover in trover. First: Property and right of possession in the plaintiff at the time of the conversion. Second: Conversion by the defendant. 2 *Greenleaf's Ev.* § 636, p. 522. 2. The naked possession of goods with claim of right, is sufficient evidence of title, against one showing no better right. 2 *Greenleaf's Ev.* § 637, p. 525, and note 1. 3. The general property has possession annexed to it by construction of law. 2 *Greenleaf's Evidence*, § 640, p. 528, and note 3. 4. A conversion is the appropriation of the thing to one's own use, &c., the illegal assumption of ownership, or withholding the possession from the owner, under a claim of title; and the conversion may be direct or constructive, and the proof of course must be direct or inferential. 2 *Greenl. Evidence*, § 642, p. 530, and notes 2 and 3; *St. John v. O'Connell*, 7 Porter, 479; *Glaze v. McMillion*, 7 Porter, 281. 5. That the note, for the conversion of which the suit was brought, is not a mercantile *negotiable* paper in the legal sense of the term, and the charges asked were based on the idea that it was negotiable, and if of that character, had not been indorsed by the payee.

DARGAN, J.—It is contended, under the first assignment of errors, that the court erred in permitting the deposition of

Jesse Thompson to be read as evidence. First, because the deposition describes a note dated on the 26th of December, and the declaration describes the note as dated on the 24th. We will not inquire whether this variance would have been fatal, if the objection had been made in the court below. It is enough that this objection was not made to the reading of the deposition in that court.

It is the right of the party to object to depositions, but he must point out his objections, and he cannot raise other objections in this court, than those made in the court below. A different practice would often lead to delay and injustice. See 11 Ala. R. 732.

The other objection to the deposition is, that the witness speaks of declarations made by the plaintiff. The witness says, he received the note from the plaintiff, with a request to send it to Montgomery for collection, and that he received it as the property of the plaintiff. We see nothing objectionable in this; the witness states that he received the note from the plaintiff; it was certainly competent for him to state the object of his receiving it, or for what purpose it was delivered to him; and we do not see how this could be done without stating the instructions given to him, how he should dispose of the note; or the requests made of him as to its disposition by the party who handed it to him.

2. The second question we propose to examine is, whether the evidence of the possession of the plaintiff is sufficient to show such a title to the note, as will sustain this action. The note, although payable to bearer, is not negotiable by delivery merely, but by statute: in order to enable any other person than the payee of the note, to maintain an action on the note itself, he must show that it was indorsed to him by the payee. See Clay's Dig. 326. And it is contended, that as it does not appear that the note was indorsed to the plaintiff, he cannot maintain this action. A question very similar to this arose in the case of *Clowes v. Harly*, 19 John. Rep. 486. The plaintiff in that case brought trover for the conversion of a bond, conditioned to make titles to land. The bond had been assigned to him, but it was admitted that he could not sue the obligor of the bond in his own name, and if the suit was on the bond itself, it must have been brought

in the name of the obligee. Yet the plaintiff was permitted in this form of action, to recover the value of the bond, which was estimated by the value of the land. This authority shows, that the owner of a note, or bond, may bring trover for its conversion, although if suit had been brought on the instrument itself, it must be brought in the name of the payee, or obligee. Nor do we see any reason why the owner of a bond, or note, may not maintain trover for its conversion upon his possession, although the instrument be not payable to him. It is a mere chattel, and all that is necessary to maintain trover, is property in the plaintiff, and the right to possession. The testimony shows, that the plaintiff below was in possession of the note, using it as his own; this is *prima facie* evidence of ownership; no claim has been asserted to it by the payee, and the evidence shows that the defendant obtained possession through the act of an agent of the plaintiff, and which act he had not authority to do. This we must hold as sufficient evidence of ownership, in the absence of proof to show the contrary.

3. It was contended, that the demand, as proved, was insufficient to authorize a recovery, as the demand misdescribed the note. A demand is never necessary, but for the purpose of showing a conversion. The evidence in this case shows, that the defendant claimed the note, and has since this suit collected the same by law of the payee. This is evidence of a conversion, and renders the demand unnecessary.

4. As the note was not negotiable by delivery, the defendant cannot resist the prior right of the plaintiff, by showing he paid value for it. Before the enactment of the statute before referred to, the defendant could have insisted on his purchase of the note for value, as against the prior owner, who may have lost it, or whose possession may have been divested by some illegal act; but, by this statute, notes payable to any person, or persons, or bearer, can be negotiated by indorsement only, and cannot pass from hand to hand, so as to enable the bearer to sue in his own name. The condition of the defendant, in reference to this note, is the same as if the words *or bearer* were stricken out, or if it had been under seal, and not indorsed. Consequently he cannot pro-

tect himself against the prior right of the plaintiff, by showing merely he had paid full value for the note.

5. The last question we propose to examine is, whether there is error in rejecting the deposition of Shaw. He was rejected as being interested, but it is very clear that his interest was balanced; for if the plaintiff recovers of Donnell, the witness is responsible to him, and if the plaintiff fails he is responsible to him. But the defendant in error insists, that although the deposition of the witness was rejected, on the ground of interest, yet this is not such an error as will authorize a reversal of the judgment, because, admitting the truth of every fact stated by the witness, it is not inconsistent with the plaintiff's right of recovery, and that on a demurrer to the evidence, as well that introduced by the plaintiff, as the deposition of Shaw, the plaintiff would be entitled to recover. We have given this question some consideration, and we conclude, that the plaintiff would have been entitled to recover, had the deposition been permitted to be read, and full credit given to it. This proof is not inconsistent, with the title of the plaintiff as shown, and there is no legal conflict between the testimony of Jesse Thompson, and the deposition of Shaw that was rejected. The nearest approach to a conflict is in this, Jesse Thompson swears he received the note from the plaintiff, and sent it to Shaw for collection. Shaw's deposition shows, that he received the note from the witness, with instructions to collect it, and apply the proceeds to the purposes of the firm of Shaw & Thompson, which was composed of the two individuals offered as witnesses. But it does not appear, that the witness had any authority to give this latter instruction, and the authority cannot be inferred from the declaration itself. The declarations of an agent cannot bind the principal, unless made by his authority, expressed or implied. See 1 Greenl. Ev. § 114; 10 Vesey, 123.

The testimony of Thompson shows he had no authority to give the instruction to collect the money, and apply it to the use of the firm.

We cannot see that any other result, according to law,

could take place, if the depositions of Shaw & Thompson were both submitted to the jury, or if the evidence was demurred to. The consequence is, the rejection of the deposition of Shaw, could not, according to the rules of law, work any injury to the plaintiff in error, and the judgment is therefore affirmed.

LUCAS AND WIFE v. HAMILTON.

1. When upon the settlement of a guardian's account, a balance was found in his favor, *quere*, is it necessary to insert in the decree the amount of the ward's share of the estate. But if the account as recorded furnishes the means of ascertaining it, it may be amended, if desired, in this court, at the cost of the plaintiff in error.

Writ of Error to the Orphans' Court of Clarke.

PROCEEDINGS were instituted in the orphans' court, and a final settlement made of the accounts of William R. Hamilton, guardian of Sarah Ann Burriss, now the wife of Charles F. Lucas, the plaintiff in error. The court, after auditing the accounts, and ascertaining that the sum of \$460 35 was due to the guardian, proceeds to make a decree, that the said guardian "having in all things performed his duty as guardian of said Sarah Ann, be discharged from any further liability on his bond, and that the same be cancelled, and held for nought." It is assigned for error, that the court does not specify in the decree, the amount due on the settlement,

W. P. LESLIE, for plaintiff in error.

The orphans' court, on a final settlement of a guardian, should insert in the decree the amount due the ward. Clay's Dig. 335, § 44.

F. S. BLOUNT, for defendant in error.

Motion to amend judgment rendered in the orphans' court by proceedings of record, in this cause. Clay's Dig. 321, § 50; 322, § 24; Wilkinson v. Goldthwaite, 1 S. & P. 150; Scales v. Swan, 9 Porter, 163; Moody v. Keener, Ib. 252; Patterson v. Burnett, 6 Ala. Rep. 844; Broughton v. Robinson, 11 Ib. 922.

CHILTON, J.—By the act of 1832, (Clay's Dig. 305, § 5,) it is provided, "that the county courts, on final settlements of executors, administrators and guardians, shall assess, and insert in their decree, the amount of their distributive share." It was necessary that the decree should state the amount, in order that execution might issue for its recovery. In this case, however, it appears there is a considerable balance due from the ward to the guardian, and as it is not competent for the court to give judgment and award execution in favor of the guardian against the ward, it would seem the reason for inserting the amount in the decree would not exist. Be this as it may, the amount appears in the account for final settlement, which account was not objected to, and which, after being examined, was approved and ordered by the court to be recorded. It then forms a part of the record in the cause, and the orphans' court could at any time, on motion, have amended the judgment; we must therefore regard it as a clerical misprision in entering the judgment. In such case, the statute forbids us to reverse the cause, but requires that the judgment be amended at the cost of the plaintiff in error.—Clay's Dig. 322, § 54; Sellers v. Smith, 11 Ala. 264; Smith v. Robinson, Ib. 271; Harrison v. Barfield, at the present Term. Let the judgment be entered in this court accordingly.

N. AND H. WEED & CO. v. BROWN.

1. When a writ is properly sued out against the maker of a note, judgment obtained, and the statutory return of "no property found," made by the sheriff, it will be sufficient to charge the indorser, though it be shown, that the maker removed to another county after the institution of the suit. *Quere*, if the indorsee is informed of such removal, and that an execution would be more likely to be availing there, than if issued in the county in which the judgment was obtained, would it not be his duty to send it to such county.
2. A writ is properly sued out, so as to charge the indorser, although the maker removed from the county a few days previous to the institution of the suit; it not appearing, that such removal was open, visible, and notorious, or that the indorsee had knowledge of the fact; or that the maker was a freeholder of the county to which he removed, or was exempt from suit in the county in which he was sued.

Writ of Error to the Circuit Court of Talladega. Before the Hon. S. Chapman.

THIS was an action of assumpsit at the suit of the plaintiffs in error, as the indorseees of a promissory note made by John Long, James Long and Wm. F. Long, by which, on the 14th February, 1840, they promised to pay to the defendant, by the 25th December, 1841, the sum of \$2,000. The indorsement by the defendant is alledged to have been made on the third day of November next after the date of the note.

The cause was tried upon the general issue, with leave to give any matter in evidence that could be pleaded in bar; a verdict was returned for the defendant, and judgment thereon rendered. From a bill of exceptions sealed at the instance of the plaintiffs, it appears to have been proved that at the time the note was made and indorsed, the makers all resided in Talladega county. Wm. F. Long left the State and died previous to the maturity of the note. John Long was in Tennessee when the note became due, and James Long was

in Talladega on that day, but left immediately after for that State; and returned with John on the 9th of January, 1842, more than five days before the circuit or county court of Talladega next after the maturity of the note. A writ was issued to the first term of the county court after the note fell due against the makers. The defendant frequently urged James Long to pay the note, saying he was bound to pay it, if witness and John did not, and a *fi. fa.* was returned "no property found."

Wm. F. Long resided in Talladega in November, 1840, and his estate, to the value of \$1,500 or \$1,600, was in that county during the years 1840, 1841 and 1842. James Long administered on Wm. F.'s estate in Talladega, and John Long was his administrator in Tennessee.

James Long resided in Talladega up to the last of January, 1842, when he removed to Randolph county, where he remained until the last of January, 1844; he then returned to Talladega, and has resided there ever since. He administered on Wm. F. Long's estate shortly after the death of the latter—about September, 1841. The present suit was instituted in January, 1844.

The court charged the jury as follows: 1. To charge the defendant as indorser, the plaintiffs should show that they brought a suit against John and James Long, to the first court to which process could be made returnable after the maturity of the note, in the county of their residence; that although they believed James Long resided in Talladega when the note was made and became due, and may have continued to live there when the first writ issued against John and himself, yet if the first writ was discontinued as to James, on whom it was not executed, and afterwards, but before another writ issued against James returnable to the circuit court of Talladega, he became a resident of Randolph for the length of time shown by the evidence, then the plaintiffs should have sued him in the latter county to the first term of the court after his removal, or should have shown a return of "no property found" as to him, by the sheriff of Randolph.

2. If James Long became a citizen of Randolph after the note was indorsed by the defendant, it was immaterial whe-

ther the plaintiffs had notice of his removal or not. 3. If at the time James Long was sued in the circuit court of Talladega, when the return of "no property found" was made as to him by the sheriff of that county, he resided in Randolph, then that return was not made by the proper officer.

The plaintiffs prayed the court to charge the jury: 1. That if they believed James Long resided in Talladega at the time the first writ issued to the county court against John and himself, and afterwards removed to Randolph, but could have been sued in Talladega, and that a return of "no property found" was made as stated in the declaration, then, the plaintiffs were entitled to recover; unless it was shown that the plaintiffs, or their agent or attorney, had notice of his removal. This charge was refused.

2. That if the jury should believe the plaintiffs have proved the allegations of their declaration, they were entitled to recover the balance of the note unpaid. This charge was given with the following qualification, viz: "*Provided*, at the time the second writ issued against James Long, or at the time the return of 'no property found' as to said James was made, he resided in Talladega county."

3. That if they believed from the evidence the defendant had agreed to pay the note, or acknowledged his liability to do so, in the event it was not paid by the makers, and this acknowledgment was made pending suits against James and John Long respectively, the jury might infer the waiver of a suit against James in Randolph. This charge was given with a qualification as follows, viz: "that if the jury believed from the evidence that said defendant agreed to dispense with the statutory requisition of suing the maker in the county of his residence, to the first court to which the action could be brought, that it was competent for him to do so, as the statute provided for a case like that. To all the charges and refusals to charge, and qualifications of charges, the plaintiffs excepted.

The declaration alleges the recovery of a judgment against John Long alone in the suit instituted in January, 1842, in the county court of Talladega—which suit was discontinued as to James, on whom the process was not served: Further, that a suit was brought in February, 1842, in the

circuit court of Talladega, and judgment therein recovered against James Long. Upon both of which judgments writs of *fieri facias* were placed in the hands of the sheriff of Talladega, and returned "no property found." These facts, it is admitted, were proved as alledged, and that the judge of the county court of Talladega being interested in the suit brought in that court, the same was transferred to the circuit court.

J. T. MORGAN, for the plaintiffs in error. The interest of the judge of the county court of Talladega was explicitly shown by the record, and it was therefore allowable to sue in the circuit court. It was at least doubtful in which county James Long lived when he was sued in the circuit court; as the change of residence had taken place so secretly, if at all, that the plaintiffs' knowledge of the fact could not be assumed, it was not an immaterial inquiry, and should have been submitted to the jury. Clay's Dig. 383, § 15. It was a sufficient compliance with the statute, that the plaintiffs sued in the county but very recently known as the maker's residence; especially where it appears that he had been evading the service of the process in the county court.

The term "proper officer," as used in the statute, does not mean the sheriff of the county in which the maker of the note resides, but such an officer as was competent to execute the *fi. fa.* issuing on the judgment against him. There was no proof that James Long had any property in Randolph, but some was levied on and sold in Talladega.

The declaration of the defendant, that he was bound to pay the note if the makers did not, may not perhaps be conclusive to show that he dispensed with the requisition of the statute, to sue the makers, yet it should have been left to the jury, as a fact from which they might, if they thought proper, have inferred that he assented to the suit in Talladega. The consent of the indorser to delay a suit against the maker of a note need not be in writing. 7 Ala. Rep. 782; 9 Id. 570. He also cited 1 Ala. Rep. 423, 394; 2 Id. 736; 3 Id. 237; 4 Id. 394; 5 S. & Porter's Rep. 96; 2 Porter's Rep. 456.

S. F. RICE and L. E. PARSONS, for the defendant in error. The suit against James Long, in the circuit court, and the return of "no property found," to the *fi. fa.* issued on the judgment therein rendered, was not a compliance with the statute. The note was made by three persons, and it is not enough to show that the statute was complied with as to one of them. Clay's Dig. 383, § 12-16; 4 Ala. 342; 5 Id. 286; 6 Id. 668.

James Long resided in Randolph county, and the return of "no property found," by the sheriff of Talladega, is not a compliance with the statute. It was the duty of the plaintiff to have inquired and ascertained his removal, and the charge upon this point was not prejudicial. 8 Ala. Rep. 73, 650, 889, 942. See 2 Ala. Rep. 736. What was said in Brown & Dimmock v. Bates, 10 Ala. Rep. 440, as to the county to which execution shall issue, does not apply in a case like the present.

COLLIER, C. J.—The act of 1828, defining the liability of indorsers, and the act amendatory thereof, enacts, that all contracts in writing, for the payment of money, or property, &c., shall be assignable, as previously they were: *Further*, that on all securities not subject to the rules of the law merchant, the assignee shall cause suit to be brought to the first court of the county where the maker resides, to which the writ can properly be made returnable; "and if he shall fail to sue the maker to the first court as herein provided for, the indorser shall be discharged from liability, unless suit shall be delayed by his consent. Again: "When judgments shall be recovered in either the circuit or county courts, or before a justice of the peace, by the assignee or indorsee of any assigned or indorsed bond, note, or other writing, and a writ of *feri facias* shall be returned by the proper officer "no property found," the said assignee or indorsee may commence his action against the assignor or indorser, on said assignment or indorsement, and the return on said *feri facias* shall be sufficient evidence of the insolvency of the maker or obligor, to authorize a recovery against him, on his said assignment or indorsement." Clay's Dig. 383, § 12 to 16.

Where the security indorsed is not subject to the rules of

the law merchant, the obvious design of the statute was to simplify the remedy against indorsers, and to substitute for demand and notice, a speedy pursuit of the maker to judgment, and a return by the sheriff of "no property found," which latter is made evidence of the inability of the primary debtor to pay.

In *Pearson v. Mitchell*, 2 Ala. Rep. 736, the action was brought to the county court, being the one first holden, and the writ was returned *not found*; thereupon the plaintiff dismissed his suit, and commenced anew to the next circuit court: *Held*, that the second suit was regularly instituted, as it would stand for judgment sooner than if an *alias* writ had been issued from the county court.

It appears in the case before us, that James Long resided in Talladega, when the sheriff of that county held the writ which was returnable to the county court; there can therefore be no question, but that suit was commenced in due season, and of the right of the plaintiff to dismiss it as to him on whom the process was not served. But the question is, in what county should the second writ have issued. The suit against James Long was instituted on the 3d February, 1842, at most but three or four days after his removal to Randolph. There is no proof that his change of residence was open, visible, or notorious, or even known to the plaintiff; and there is nothing in the record to indicate that he was a freeholder in Randolph, or that he was otherwise exempt from liability to suit in Talladega. The fact that the judgment was rendered against him, is perhaps conclusive, that he was suable in Talladega.

The suit against John Long was transferred to the circuit court, in consequence of the probable interest of the judge of the county court, and judgment was rendered therein on the 31st May, 1843—a judgment having been recovered against James Long two days previously. Thus we see that the plaintiffs obtained a judgment against both the defendants quite as soon as if the service of the writ first issued had been perfected to the term to which it was returnable; and the judgment against James Long was not delayed by suing him to the circuit court.

If then, the suit against James Long was regularly instituted in the circuit court of Talladega, the plaintiffs were not bound to take notice of his removal to Randolph, and cause a *fieri facias* to be placed in the hands of the sheriff of that county. If they had been informed of it, and that an execution would there be likely to be more availing than if issued to the latter county, perhaps it would have been their duty to have had it issued there. But they are not charged with such a duty in the absence of any information on the subject; and it cannot be assumed from the proof set out in the record that the return of "no property found," was not made by the "proper officer."

This view may suffice to show the error in the ruling of the circuit court. The other questions raised will hardly present themselves on a future trial: if they do, a slight attention to very plain principles will prevent a misapprehension of the law. We have but to add, that the judgment is reversed, and the cause remanded.

HODGES v. THE BR. BANK AT MONTGOMERY.

1. The husband is an incompetent witness for the wife, in a controversy in which she is asserting property levied on as the property of the husband, to be her separate estate.
2. A decree in chancery, vesting in the wife certain property of the husband, to her sole and separate use, upon the allegation that the husband was indebted to the wife an equal amount, is void, as against the creditors of the husband, if the design in instituting the suit in chancery was to hinder, or delay them, in the collection of their debts.
3. It is not a valid objection to a charge, that it is too general, and the jury might have been misled by it. It is the duty of the party objecting to it, to ask specific instructions.

Error to the Circuit Court of Barbour. Before the Hon. G. D. Shortridge.

THIS was a trial of the right of property: an issue was made up, whether the slave was subject to the execution? The testimony tended to show, that the slave was purchased with the money of John P. Boothe, the defendant in the execution. The claimant, in order to sustain his claim, showed title to the slave under a decree rendered in the court of chancery, upon a bill filed by Mrs. Martha R. W. Boothe, the wife of the defendant in execution, against her husband, in which it was alledged, that the slave in controversy was purchased with the proceeds of a slave that was the separate property of Mrs. Boothe, and prayed the correction of an *ante-nuptial* agreement; and also, that the title to said slave might be vested in the claimant as trustee, for the separate use of the complainant. The decree was rendered according to the prayer of the bill.

In order to sustain the *bona fides* of the decree, the claimant offered to prove the admissions and declarations of John P. Boothe, the defendant in execution, made anterior to the filing of the bill, and prior to the existence of the plaintiff's debt, that he was indebted to Mrs. Boothe, and had received the proceeds of a negro slave, that was the separate property of his wife, equal to the value of the slave levied on. The court rejected the evidence of these admissions and declarations. The proof tended to show, that the slave was purchased with the money of the defendant in execution, but also, that he was indebted to his wife, before the filing of the bill. The evidence also tended to show, that the proceedings in the court of chancery, were intended to delay and hinder creditors. The court charged the jury, that although the defendant in execution might have owed his wife, Mrs. Boothe, more than the value of the slave, at the time of filing the bill, yet if the motive in instituting said suit in chancery, was not for the purpose of paying her, but was intended to hinder or delay the creditors, then as against them,

the decree would be void. To this charge the claimant excepted, and here insists, that the court erred in rejecting the evidence of the admissions of John P. Boothe, and also in the charge given. See 12 Ala. Rep. 120, for this cause at a previous term of this court.

Buford, for plaintiff in error.

Sayre, contra.

DARGAN, J.—The rule is well settled, that a husband, is an incompetent witness, in a controversy respecting the rights of his wife, to sustain those rights. See Hall v. Dargan, 4 Ala. Rep. 696, and the cases referred to. It is equally clear, that a party cannot complain that the charge of the court is too general, if it be not repugnant to the rules of law. In this case the charge is not assailed as contrary to law, but it is insisted that it was too general, and that the jury might have been misled by it. If the claimant desired a more specific charge, it was his duty to ask it of the court below, and it would have been the duty of the court to have given it, if the charge was legal; but in the absence of any request for special instructions, he cannot complain on error, that the charge is too general. See 3 Phil. Ev. 790. In this case the charge is legally correct; if the defendant has failed to request more specific instructions, he cannot alledge his neglect as the ground of error.

It follows that there is no error in the record, and the judgment is affirmed.

DUKES v. LEOWIE.

1. Indebitatus assumpsit will lie upon an executed parol contract; and although it is usual to count upon the special contract, and if it be conditional to aver performance of the condition, the common count is sufficient.

Error from the County Court of Perry.

THE plaintiff declared in assumpsit for \$225. The declaration contains all the common counts. Plea, general issue. Verdict and judgment for defendant. A bill of exceptions, sealed at the trial, shows these facts: The plaintiff proved by one witness that the defendant had stated to the witness he had purchased of the plaintiff a counter and shelves for a store house, and was to give the plaintiff one hundred and sixty dollars for them. Here the plaintiff closed. The defendant then proved a conversation between the plaintiff and himself, in which plaintiff said to him, "what about the counter and shelves?"—remarking, at the same time to defendant, that he could have them for \$170. Defendant refused to give that price, but said he would give \$160 for them, provided the plaintiff would take care of them, and keep them until the defendant should build his store house, and would then repair and put them up, which proposition the plaintiff refused to accept, and the parties separated. It was further shown, that the plaintiff still had possession of the counter and shelves, which were put away by him upon his premises. There was no evidence tending to show that the plaintiff had ever delivered, or offered to deliver said articles to defendant.

The court charged the jury, that if they believed there was a contract of sale between the plaintiff and the defendant in relation to said counter and shelves, and that said contract was special and conditional, the plaintiff could not recover on the common counts in the declaration. This charge is assigned for error.

JOHNS, for plaintiff in error.

Indebitatus assumpsit will lie to recover the stipulated price due on a special contract not under seal, where the contract has been executed; and in such a case, it is not necessary to declare on the special agreement, but the common count is sufficient. 1 Chit. Pl. 339, 340, and note; Perkins v. Hart, 11 Wheat. 237; Way v. Wakefield, 7 Verm. R. 223; Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299; Fel-

low v. Dickinson, 10 Mass. 287. Consequently, the charge of the court, "that if the jury believed that the said contract was special and conditional, the plaintiff could not recover on the common count in the declaration," was clearly incorrect. The jury should have been permitted to inquire, whether the plaintiff had performed the conditions.

No counsel for defendant.

CHILTON, J.—The court below, in its charge to the jury, clearly misconceived the law. There is no principle of pleading better settled, than that *indebitatus assumpsit* will lie to recover upon a contract not under seal, if it has been executed. It is usual to count upon the special contract, and if it be conditional, to aver a performance of the condition; but the common count is altogether sufficient. See 1 Chit. Pl. 339; Fellow v. Dickinson, 10 Mass. R. 287; 11 Wheat. R. 237; 7 Cranch, 299.

But although the charge, as an abstract proposition of law, is incorrect, we must nevertheless institute the inquiry, as to whether the plaintiff in error could have sustained any injury from it. The bill of exceptions informs us that there was no evidence showing *a delivery* of the counter and shelves, or *an offer to deliver*. If the proof had stopped here, we should not feel justified in saying the plaintiff had sustained any injury, for it would be most manifest that the contract was executory—not executed. But the defendant acknowledged he had purchased the property, and for aught that appears, it may have been left with the plaintiff as bailee. We cannot, then, determine that no injury resulted to the party, or that the contract had not been executed. The whole proof is not set out in the bill of exceptions, and we are not allowed to presume that the affirmative charge of the court was abstract. Peden v. Moore, 1 S. & P. 71; Rowland, et al. v. Ladiga, 9 Por. R. 488. The true rule is laid down in Smith v. Houston, 8 Ala. R. 736. It is there stated, "when giving full credit to the plaintiff's proof, it fails to make out such a case as entitles him to recover, a charge to the jury which is erroneous, as the assertion of a legal proposition, furnishes no ground for the reversal of a judgment against

him." In such case, it is obvious that the court must be in possession of all the facts, and must be able to determine, as upon a demurrer to the proof, that the party complaining of the improper charge has no right to recover. See *Armstrong v. Tate*, 8 Ala. Rep. 635; *Armstead v. Thomas*, 9 Ib. 586.

For the error in the charge given to the jury, the judgment is reversed, and the cause remanded.

AINSWORTH v. PARTILLO.

1. When an agent is instructed not to sell a horse for less than \$500, and he notwithstanding sells for a less sum, in an action by the owner against the agent, the measure of damages is not the difference between the price placed on the animal by the owner, and the sum for which it was sold, but the actual injury sustained by the breach of the instructions.
2. When an agent instructed to sell a horse, exchanges it for another, the act is a conversion, and the agent becomes liable to the owner, for the value of the animal, without a demand.
3. The refusal of a court to non-suit a plaintiff, because his recovery is less than \$50 is not a matter revisable on error.

Error to the Circuit Court of Benton. Before the Hon. G. W. Lane.

THIS was an action of assumpsit, at the suit of the defendant in error. The declaration, among other counts, embraces one for goods, wares and merchandize, sold and delivered; money had and received, and an account stated. The cause was submitted to a jury, who returned a verdict for the plaintiff, for \$22 damages, and judgment was rendered accordingly. From a bill of exceptions sealed at the defendant's instance, it appears that evidence was adduced tending to show, that in the spring of 1841 plaintiff sold to defendant a bay mare, that the defendant was to sell her for not

less than \$500, or if he failed to sell her for that price, then he was to carry her to Tennessee, &c. *Further*, if the mare was sound, she was worth from three to five hundred dollars.

Defendant introduced proof tending to show, he was authorized to sell the mare for the best price she would command, or take her to Tennessee, &c. *Further*, that when he received the mare she was blind in one eye, and the other injured, and her value was from \$100 to \$150. After defendant received her, she became the subject of litigation, whereby he was prevented from taking her to Tennessee at the time agreed on. When she was released he started with her, and she became diseased in her shoulder on the way, and was unable to travel, so that he was compelled either to leave or to trade her. Under these circumstances, the mare being of but little value, the defendant traded her for a two year old colt.

There was no evidence that the plaintiff ever demanded the mare or colt previous to the institution of this suit. On the part of the plaintiff, it was proved, that the mare subsequent to her sale by the defendant, performed well under the saddle.

The court charged the jury, that if the agreement between the plaintiff and defendant was, that the latter should not sell the mare for less than \$500, and that he did sell her for less, then the plaintiff was entitled to recover that sum, subject to abatement by any sum which the defendant may have paid for the plaintiff.

Defendant prayed the court to charge the jury, that the plaintiff could not recover in this action, unless they could ascertain from the evidence, the amount which the defendant received for the mare. *Further*, if the defendant was authorized to sell the mare for the best price she would command, the plaintiff was not entitled to recover, in the absence of proof of a demand of the mare, or her value, or of proof of a settlement by the plaintiff of the amount due the defendant from the plaintiff. This charge was refused, and the jury were instructed, that if the defendant was authoriz-

ed to sell at the best price he could obtain for the mare, the plaintiff was entitled to recover her actual value, without reference to what the defendant obtained for her ; that as the defendant might have shown the value of what he received, and failed to do so, the want of evidence on this point was a circumstance for the jury to consider against the defendant.

After the verdict was returned, the defendant moved to non-suit the plaintiff, because the recovery was less than \$50, and no affidavit was made as required by the statute; but his motion was overruled.

Thereupon the defendant moved in arrest of judgment—

1. Because there is a misjoinder of counts in the declaration.
2. Because each of them is insufficient.
3. Because the declaration is a departure from the cause of action, as shown by the writ of attachment, which is the leading process in the cause. But this motion was in like manner overruled.

W. B. MARTIN, for the plaintiff in error.

S. F. RICE, for the defendant in error.

COLLIER, C. J.—The act of 1824, to regulate pleadings at common law, enacts, that “no cause shall be reversed, arrested, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings not previously objected to: *Provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon.” Clay’s Dig. 322, § 53. Without undertaking to scan the declaration in the present case with particularity, it is perfectly certain, that the common counts at least set out a good cause of action. The judgment entry shows, that the issue tried threw upon the plaintiff the burthen of making out his case; this is sufficient to indicate its materiality, and to bring the case within the salutary influence of the act cited.

The affidavit and attachment merely alledge the indebtedness of the defendant in a sum certain, without stating how it originated or is evidenced; several of the counts at least, charge that the defendant is indebted to the plaintiff, and thus far we can discover no discrepancy between the writ and declaration. All the counts are professedly in as-

sumpsit, so that there is no misjoinder, even if it were allowable to make this point after verdict.

In *Cummings v. Edmundson*, 5 Porter's Rep. 145, the statute which authorizes a plaintiff to be non-suited where he institutes a suit for a less sum than the court can take jurisdiction of, or demands a greater sum than is due, on purpose to evade the act, unless he shall make an affidavit that the sum for which the suit is brought is really due, but for want of proof he failed to recover, was fully considered. We there said, "the act certainly guards the plaintiff from any injury from an improper exercise of the discretion reposed in the court by permitting him, in cases where an opinion prevails that he has improperly used the jurisdiction of the court to avoid the consequences, by making the requisite affidavit; and we do not hesitate to say, that it would be error to render a judgment of non-suit, when such affidavit was interposed; but in all other cases under the latter clause of the statute, the action of the court being discretionary, and to be governed by circumstances, cannot be the subject of revision here." This decision has been repeatedly followed, and very clearly determines, that the refusal of the circuit court to non-suit the plaintiff in a case like the present is not a fatal error.

Although the plaintiff may have instructed the defendant not to sell his mare for less than five hundred dollars, and the latter undertook to follow his instructions, yet if he made a sale at a less price, the sum at which he was authorized to sell, would not necessarily be the measure of damages which the plaintiff was entitled to recover. In *Austill & Marshall v. Crawford*, 7 Ala. Rep. 335, the principal instructed his factors, in whose hands he placed cotton, not to sell for less than fourteen cents *per pound*: *Held*, that a disregard of this instruction, did not impose a liability on the factor to pay the difference between that price and a smaller sum at which the cotton was sold by him; but the actual injury sustained by the principal, was the criterion of the damages, and this could be ascertained by proof of the price at which cotton of the same quality was sold during the season. See also *Webster v. De Tastel*, 7 T. Rep. 157; *Short v. Skipwith*, 1 Brockb. Rep. 103.

These citations are decisive to show that the circuit court did not lay down the law correctly in the first charge to the jury, in instructing them, that if a sale of the mare was made for less than \$500, the defendant should account for her at that price. Her value was the injury sustained by the plaintiff, and by this, the court should have charged the jury, his recovery should have been graduated.

It was not necessary for the plaintiff to prove how much the defendant received for his mare, or if he had exchanged her, to show a demand previous to the institution of the suit. The amount received by the defendant, we have seen, cannot determine the plaintiff's damages; therefore, it was unnecessary to adduce proof to this point, or do more than show the value of the animal. Neither the evidence adduced by the plaintiff, or defendant, show that the defendant was authorized to exchange the mare; but the reverse is fairly inferable.

The exchange then, was an act which made the defendant liable for her value—was in itself a conversion, and the defendant became chargeable to plaintiff without any step to be taken by the latter to perfect his right of action. This conclusion is the result of legal principles so clearly established, that it is needless to cite authorities to prove it. Whether an agent who has faithfully pursued his authority, without placing himself in a position antagonistic to his principal, can be sued by the latter previous to demand and notice, is another question. For the error in the first charge to the jury, the judgment is reversed, and the cause remanded.

DENHAM & WARFORD v. HARRIS.

1. The *lien* of a landlord, upon the goods of his tenant, where an execution or attachment is levied upon them, is confined to the rent due at the time of the levy; and although the goods are permitted by the officer to remain upon the premises until rent is due, they are in the custody of the law, and the *lien* will not attach.
2. The *lien* of the landlord, is not impaired, by his taking from the tenant a note with surety for the payment of the rent.

Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

JAMES HARRIS, filed a petition in the circuit court of Dallas, setting forth, that he leased to William H. Steetz a lot of ground in Cahawba, for the year 1846, and that Steetz executed to him a note for the rent, with Ulmer as security, for \$132, due at twelve months, dated 31st December, 1845. That the note is due and unpaid. That during the year 1846, the sheriff of Dallas county levied an execution issued in favor of Denham & Warford v. Steetz & Howlet, on a lot of goods then being on the rented premises, and that before the sheriff removed the goods from off the premises, he gave notice to him that there was one year's rent due to him, amounting to \$132. The note is set out in the petition, and the entire amount is due twelve months after the date of it. The execution is referred to, and set out, from which it appears, that the levy was made on the 30th of December, 1846. It also appears from the petition, that the sheriff sold the goods under the execution, and that he held the money, and Harris moved the court, that he be ordered to pay to him, from the proceeds of the sale, the amount of the note, being for the rent of the premises on which the goods were, at the time of the levy. Denham & Warford, the plaintiffs in the execution, being served with notice of this application, appeared and interposed objections to said motion, by way of

pleas, to the petition of said Harris. The first objection by way of plea, is, that the property from the proceeds of which the petitioner seeks payment of his debt, was levied on by an attachment, at the suit of the defendants in this motion, in March, 1846, and whilst the goods were under an attachment, at the suit of one Forlow, whose writ of attachment was levied on the goods in September, 1845, when said goods were not on the rented premises, and that said goods remained in custody of an officer of the law, under said levy, until the levy of the attachment of these defendants, in March, 1846, and that said goods still remained in custody of the law, until sold under the execution referred to, in the petition. They also objected, that the plaintiff in the motion, having taken security on the note for the rent, had waived his *lien*. These are the only objections necessary to be noticed. The defendant in error demurred to those pleas, and the court sustained the demurrer. The plaintiffs in error then pleaded, there was nothing due to Harris for rent, on which issue was joined, and a jury was impaneled to try the same, who returned a verdict in favor of Harris. That the allegations in his petition were true, and that Steetz was indebted to him for the rent of the premises.

Forlow also appeared, and asserted his right to the money, by virtue of his levy in September, 1845, which was allowed by the court, the amount due him being only about \$50.

The court rendered a judgment, ordering the sheriff to pay to Harris the amount of his note, being for rent during the year 1846, from the proceeds of the sale of the goods. To reverse this judgment, a writ of error is sued out to this court.

The errors assigned are, that the court erred in sustaining the demurrer to the pleas filed to the petition.

GAYLE, for plaintiff in error. The proceeding should have been quashed on Harris's demurrer, because—

1. The petition shows a transfer of *lien* to Conoly, which never could return to Harris; that is, if this *lien* is analagous to an equitable one. 1. Was there a transfer? See record; and the effect of written transfer, 4 Porter, 14. 2. The transfer suspended Harris's right forever. 2 J. R. 470.

2. But, the transfer of the note to Conoly could not carry the *lien*, which was a personal legal one, and not transferable—and therefore the transfer, made before the levy, waived the *lien*. 1. The possession, essential to the continuance of the *lien*, never passed to Conoly. See 6 Am. Com. L. 444-5. 2. A *legal lien*, is a personal right, and not assignable. See Jones v. St. Clair, 2 N. H. 321; 6 Am. Com. L. 455, note.

3. The petition shows that no rent was due when the goods were taken in execution—and unless rent was due there was no *lien*. Clay's Dig. 210; Whidden v. Toulmin, 6 Ala. 104. The note for rent fell due on the 31st December, 1846, and the levy was made on the 30th December, 1846. No rent due till pay day comes. 2 U. S. Dig. 748, § 316; 15 Mass. 268; 11 Ib. 488.

4. The fourth plea good—personal security taken for the rent. See particularly, Foster v. Athenæum, 3 Ala. 302.

LAPSLEY, contra.

DARGAN, J.—The act of 1807 (Clay's Dig. 210) which provides, that no goods or chattels, lying or being on any mesuage, lands or tenements, leased for life, or term of years, or at will, or otherwise, shall be liable to be taken on execution, on any pretence, unless the party, before removing the goods, shall pay the rent then due, provided the same do not amount to more than one year's rent, has received a construction by this court in the case of Whidden v. Toulmin, 6 Ala. R. 104, that we now approve, which is, that the *lien*, or right of the landlord to demand payment of the rent, at the time of the levy, is confined to the rent due at the time of the levy, or seizure of the goods, and does not extend to rents falling due after the levy. The act above referred to, is substantially the same as the act of 8th Ann, c. 14, which has received the same construction, in the case of Hoskins v. Knight, 1 Maule & Selwyn, 247. In this case the court held, that the rent due at the time of the taking by the sheriff, was all that could be demanded by the landlord, and that rent falling due after the levy, or seizure, could not be demanded. So in 18 John. 1, a levy was made by the sheriff on goods of a tenant, in July, and there was a quar-

ter's rent due the landlord in May preceding ; the sheriff permitted the goods to remain on the premises until September, after the levy, and another quarter's rent fell due in August, whilst the goods were yet on the premises. The goods being removed and sold in September, the landlord moved to have the proceeds applied to the payment of the two quarters' rent, due the first of May and August ; but the court said, the statute gave a *lien* to the landlord for the rent due at the time of the levy, not for that falling due after the levy, although the goods remained on the premises until the next quarter's rent fell due. The court ordered the sheriff to pay the landlord the rent due the first of May preceding the levy only. This construction of the same act has been recognized in 3 Wend. 444.

These authorities show, that the rent that the landlord is entitled to demand, is the rent due at the time of the levy, not the rent subsequently falling due. The only question therefore is, what rent was due at the time of the levy : The levy of the attachment was in March, 1846, but the sheriff did not remove the goods until the levy of the execution. Yet there can be no difference between a levy or seizure by an attachment, and a levy by execution. In both instances, the possession of the defendant is divested, and the possession vested in the sheriff, for the purposes designated in the writ. Consequently, if goods be levied on by execution, or by attachment, the landlord can demand of the sheriff only the rent due at the time of the levy ; not that falling due after the levy. Testing the record by this rule, the court erred. The plea that the goods were levied on in March, before any rent was due, and remained in the custody of the law, was good, and the petition shows, that even at the time of the levy under the execution, the note for rent was not due, and if this be so, no demand could be made on the sheriff for rent, for none was due at the time of the levy made by the execution, and clearly none at the time of the levy of the attachment. It therefore follows, that the judgment of the circuit court, so far as it orders the sheriff to pay the defendant in error the amount of the note given for rent, is erroneous.

The second objection, or plea, that the taking of the note

of Steetz, with Ulmer a security, was a waiver of the *lien* of the landlord, cannot be sustained. The right, or *lien* of a landlord, is a legal right, not a mere equitable *lien*, and before the court can say, that the landlord has waived or abandoned this legal right, there must be some plain evidence to show it. The mere fact, that he has seen fit to increase his security for rent, by requiring another name to be bound with the tenant, cannot be construed, in the absence of all other proof, as a waiver of his statutory right.

For the error before alluded to, let the judgment be reversed and the cause remanded.

MOORE & COCKE v. BELL.

1. Execution cannot be sued out on a judgment after the death of the plaintiff, in his name, and if it is so issued, may be superseded by the defendant, and quashed on motion.
2. A writ of error cannot be prosecuted on a judgment of the court refusing to quash, in the name of the deceased party, as defendant to the writ. The remedy, it seems, would be by an application to the supreme court for a *mandamus*.

Error to the County Court of Perry.

BUSHROD W. BELL, having obtained a judgment in the county court of Perry county, at the February term, 1846, against John B. Moore, for the sum of \$285 33, afterwards, the 8th July, 1847, the said plaintiffs in error filed their petition in the said court, in which, after reciting the proceedings and judgment against said Moore, it is averred, at the time the judgment was rendered, as petitioners believe, and certainly before the issual of any execution thereon, the said plaintiff in the judgment departed this life, and that said

judgment has never been revived in the name of any other person. Said Moore avers, he had no notice of the pendency of the suit, and that before any action, he had agreed with Bell to pay, and had actually paid to one Cary, the amount due upon said note, which payment it was agreed should be a full satisfaction of said demand. Petitioners further aver, that an execution having issued on said judgment, and having been levied on the property of said Moore, he executed a forthcoming bond, with the said Cocke as surety, upon which bond (the same having been returned forfeited) execution was issued against each of the plaintiffs, on the 22d February, 1847, returnable to the then next term of the county court for Perry county, and was then in the hands of the sheriff, and was about to be levied of the goods, &c. of the petitioners.

Petitioners pray a supersedeas of the execution, stopping all further proceedings, until the said next term of the county court, at which term they prayed the judgment might be declared null and void—that the execution might be quashed, &c. Upon which petition a supersedeas was ordered, the parties giving bond as required by the statute. The county court, upon the motion of the attorney representing the plaintiff, Bell, dismissed the petition for the supersedeas, and gave judgment against the said petitioners for costs. The judgment of dismissal is assigned in this court for error.

I. W. GARROTT, for plaintiff in error.

A. B. MOORE, contra. 1. Applications for the continuance of causes, are addressed to the discretion of the court below, and will not be revised by this court. See *Childs v. Lockett*, 11 Ala.

2. It was too late to amend the petition after the case had been called for trial; at all events, the court had the right to refuse to permit the party to amend.

3. As it is clear there is nothing in the face of the petition to warrant the supersedeas, it should therefore have been dismissed.

4. There is no error in the rendition of the judgment, of

which the plaintiff in error can complain. See Clay's Dig. 208, § 40.

CHILTON, J.—By the act of 1822, (Dig. 297, § 8,) it is provided that judges of the county courts, within their respective counties, shall have full power, concurrent with the power of the judges of the circuit courts, to issue writs of *certiorari* and *supersedeas*, returnable to the county courts in the same manner as writs of this character had theretofore been issued by the judges of the circuit courts. The county court having, by virtue of this statute, full jurisdiction of the petition, I cannot readily perceive upon what grounds it was dismissed. True, it alledges matter of payment going beyond the judgment, which the court should not inquire into. Nor will it avail the petitioners, that the writ was not served on the defendant in the judgment. But it is distinctly averred, that the plaintiff was dead before the execution issued, and this being the case, no execution could regularly have issued until the judgment was revived in the name of the personal representative by *scire facias*. I have been unable to find any statute of this state providing for the revival of judgments in cases where the plaintiff dies before execution begun. Provision is made for the revival of suits pending their prosecution. In 2 Lord Ray. 808, it is held, that in no case, where the parties to a judgment are changed, ought execution to issue out by a different writ, without *scire facias*. In *Berryhill v. Wells*, 5 Binn. Rep. 56, which was a proceeding to revive a judgment by *scire facias*, by reason of the plaintiff's death, it was objected, that the statute did not confer the authority, but Tilghman, C. J., remarked, "I consider the power of issuing a *sci. fa.* as appurtenant to the power of issuing an execution, and included in it, though not expressly mentioned." A *scire facias post annum et diem*, did not lie at common law, but was given by the statute of Westm. 2, c. 45. In such case, where the plaintiff was guilty of such laches, he was put to his action on his judgment. 2 Inst. 469; see 3 Ala. Rep. 224. In *Day v. Sharp*, 4 Whart. Penn. Rep. 339, it is held, that although an execution which issues in the name of the plaintiff who is dead, is irregular and voidable, it is not absolutely void. In the present case,

a forthcoming bond has been given, and the sheriff has returned it forfeited. According to our statute, execution is to issue upon the bond, which has the force and effect of a judgment, but this cannot have the effect to give vitality to the irregular process. The last execution is liable to the same objection as the first—there is no plaintiff in *rerum natura* to whom satisfaction can be made, and who is answerable for an abuse of the process of the law. In *Wagon v. McCoy's Executor*, 2 Bibb's Rep. 198, it was held, that where an execution issued pending the life of the plaintiff, but who died before any levy was made, it abated by his death, and on motion of the defendant the *fi. fa.* was quashed. See also, *Woodcock v. Bennett*, 1 Cow. Rep. 711, in which it is said to be a general rule, that where any new person is to be the better, or worse, by the execution, there must be a *scire facias*.

The decisions are numerous in our own court, that if execution issue for the first time upon a judgment after the death of the defendant, it is a nullity. *Collingsworth v. Horn*, 5 S. & Por. Rep. 237; *Holloway v. Johnson*, 7 Ala. R. 660; *Henderson & Hudson v. Gandy's Adm'r*, 11 Ib. 431.

The above citations will suffice to show, that the execution which issued in this case, and which was superseded was irregular, and the remaining question is, did the plaintiffs in error pursue the proper course to avoid it. The writ of error *coram vobis*, as recognized by our statute, (Dig. 322, § 56,) seems to contemplate relief, only in such cases as the error is apparent, from an inspection of the record. See also, 3 Bac. Ab. 366, Bos. ed. The remedy by supersedeas, is with us a substitute for the old writ of *audita querela*, which gave relief against unjust judgments, or executions, by setting them aside for some injustice, fault, or irregularity, in the party obtaining them, and which could not have been pleaded in bar to the action. This writ has gone into disuse, by reason of the more summary remedy afforded by the judges in granting orders to stay proceedings, until a motion can be made to quash the irregular process. *Tidd's Pr.* 212, 511. Our statute giving this summary redress, has received a very

enlarged exposition, and is held to apply to all cases, where the process is either irregular, or may not justly be enforced. See *Lockhart v. McElroy*, 4 Ala. Rep. 572; 7 Ib. 469. The petition is the commencement of a suit, and may be pleaded to. *Mabry v. Herndon*, 8 Ala. Rep. 848; *Spence v. Walker*, 7 Ala. Rep. 568; *Shearer v. Boyd*, 10 Ala. Rep. 281. In this last case, as also in the case of *Osweechee Co. v. Hope*, 5 Ala. 629, it is held, the petition, though quashed, and the supersedeas discharged, still may be regarded as a motion to quash the *fi. fa.* superseded. We feel satisfied, in view of the authorities on this point, that the court erred in dismissing this petition, but regarding it as a motion to quash the execution, should have proceeded to inquire into the fact, whether the plaintiff died before any execution issued, and if this be found true, the execution should have been quashed.

The plaintiff in error in this court, proceeds upon the ground of the death of the plaintiff below. There is then no party defendant to this writ of error, and as the authority of an attorney dies with the principal, this objection is not cured by appearance in this court. The writ of error must be dismissed.

There is however, no failure of the remedy, as it is in the power of this court, upon a proper application, to control the action of the inferior court by *mandamus*.

Let the writ of error be dismissed.

SPANN v. COLE.

1. If the clerk commits an error in the taxation of the costs, it will be corrected on a motion to retax the costs, but furnishes no ground for quashing the execution.

Writ of Error to the Circuit Court of Macon. Before the Hon. S. Chapman.

THIS was a motion to quash an execution. It appears from a bill of exceptions, sealed at the instance of the defendant in the action, that the defendant made an application for the continuance of the cause, which the circuit court granted, upon condition that he would confess a judgment for so much of the plaintiff's demand as was undisputed. The condition was assented to, and a judgment by confession rendered against the defendant for five hundred dollars, "and the costs in this behalf expended." At a subsequent term of the court, the plaintiff suffered a non-suit, and judgment was rendered against him for costs. The *fi. fa.* objected to, issued on the first judgment, and commanded to be made not only the five hundred dollars, but court costs and compensation to witnesses; the motion to quash applied alone to the costs, and was denied.

W. W. McLESTER, for plaintiff in error.

N. W. COCKE and G. W. GUNN, for the defendant in error, cited 2 Stew. Rep. 228; 3 Stew. & P. Rep. 393; 3 Port. R. 335; 3 Ala. Rep. 653; 11 Ib. 483.

COLLIER, C. J.—The assignment of error brings to our view the correctness of the judgment of the circuit court on the motion to quash. Whether the confession by the defendant that he was indebted to the plaintiff in the sum of five hundred dollars, leaving open for contestation the residue of the demand, authorized a judgment for costs, is an inquiry which cannot now be made. It is however worthy of consideration, whether, as the plaintiff must have been successful if the cause had progressed to a trial, without the intervening judgment, and consequently entitled to costs, the court would not, upon the judgment of non-suit, have given him the costs accruing up to the first judgment? If

so, the defendant has but little ground of complaint in any form of proceeding.

The judgment under which the *fi. fa.* issued is, that the plaintiff recover the costs. Here was an ample warrant for the clerk to issue an execution; and it was not competent on a motion to quash, to vacate or modify this judgment. If amendable by the court rendering it, a specific motion should be made for that purpose.

If the clerk committed an error in taxing the costs, that error could be corrected on a motion to retax; but furnishes no ground to quash the execution.

We have but to add, that the judgment denying the defendant's motion is affirmed.

R. BISHOP'S HEIRS v. THE ADM'R AND HEIRS OF S. BISHOP.

1. Parol evidence is admissible to show, that a deed, or bill of sale, absolute on its face, was intended as a mortgage, or that it was executed and delivered upon certain trusts, not reduced to writing, and upon the proof being made, a court of equity will decree their execution.
2. A court will not declare a deed absolute on its face, to be conditional, or upon a trust, but upon strong and stringent proof, and will pay but little attention to the casual remarks of men about their property; but when the trust is clearly made out, will execute it.
3. It is only necessary in chancery pleading, to alledge the facts upon which the relief is sought; and though the proof of the fact consists of the admissions of the opposite party, it is not necessary to alledge in the bill, that such admissions were made.
4. The complainants having alledged two trusts, first, that the trustee was to hold certain slaves for the use of the complainants, for a fixed period, and then to convey them; the last mention trust being proved, should be enforced, though the complainants failed to prove a trust in their favor before that time.

R. Bishop's Heirs v. The Adm'r and Heirs of S. Bishop.

Writ of Error to the Chancery Court of Autauga. Before the Hon. W. W. Mason, Chancellor.

THE bill alledges, that Reuben Bishop, the father of complainants, Phebe Ann, Patience, Alfred, James, Abraham and Mary, on the 25th day of September, 1825, in the county of Greene, and State of Georgia, conveyed to James W. Fannin certain slaves, with their increase, upon the express agreement and understanding, made by said Reuben Bishop and said Fannin, that he, the said Fannin, would convey said slaves to the State of Alabama, and deposit them with Stephen Bishop, the brother of Reuben Bishop, to be held by the said Stephen Bishop, in trust for the benefit of the children of the said Reuben, until the youngest should arrive at the age of twenty-one, and then to convey said slaves with their increase, to said children. That Fannin received the said slaves upon the foregoing terms and conditions, and in 1827 brought the slaves to Alabama, and delivered them to Stephen Bishop, who received them upon the terms and trust aforesaid. That although said Fannin received said slaves under a bill of sale, absolute on its face, and expressing a consideration of \$6,700, yet it was intended and meant by the said Reuben Bishop, and understood and received by the said Fannin, as a conveyance, for the purpose of enabling him to remove said slaves from the State of Georgia, to the State of Alabama, and to deposit them with the said Stephen Bishop, for the purpose aforesaid; and that no part of the consideration expressed in said bill of sale was ever paid, or intended to be paid to the said Reuben Bishop, and nothing was paid by the said Stephen Bishop, on receiving them of Fannin. That the said Stephen Bishop received them of said Fannin on the trust heretofore expressed. That said Stephen has sold two of them, Peter and Dinah, but complainants do not know how much he received for them. That Stephen Bishop retained the possession of said slaves until his death, in 1840, and that John Wood one of the defendants was appointed administrator of his estate, and as such, took possession of said slaves. The bill then goes on to state, that said slaves have been distributed amongst the defendants, who are the heirs at law of Stephen Bishop,

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some being retained by Wood, in the right of his wife, who was the daughter of Stephen Bishop. The bill then designates such as have come to the possession of each of the defendants, and their respective value, and avers that the labor and services of said slaves were received by said Stephen during his life, and that the value of such services, after deducting all reasonable expenses, amounted to \$14,500. That Reuben Bishop departed this life in the year 1827. That Phœbe Ann, Patience, Alfred, James, Abraham and Mary, are the only children living of the said Reuben Bishop, and are his heirs at law. That Phœbe Ann has intermarried with Reuben Turner; Patience with Waddy Jackson, and Mary with William Jackson, who are made parties complainants. That each of the complainants have arrived at the age of twenty one years, and are entitled to a conveyance of said slaves, and to receive the value of their hire and services. That said Wood, as administrator, and said defendants, the children of Stephen Bishop, have failed, and neglected to convey said slaves to complainants, or to account for their services.

The bill prays that the trust be established, that the defendants be decreed to hold said slaves in trust for complainants, that they do convey the same, and that they account for the profits and value of said slaves, and also for general relief.

The defendants file a joint answer to the bill. They admit that Reuben Bishop may have executed a bill of sale of the slaves to Fannin, but deny that there was any agreement that Fannin was to convey said slaves to Alabama, and deposit them with Stephen Bishop, to be held by him in trust for the children of Reuben, until the youngest became of age, and then to convey them to the children of said Reuben. The answer further denies, that Fannin received the negroes on said terms and conditions; and from information and belief, the defendants state, that Reuben Bishop and his wife, not living happily together, he had executed a deed of trust to one Mapp, conveying to him, for the use of his wife, during her life, certain negroes, stock, land, &c. That Reuben Bishop was considerably indebted at the time; that the creditors became clamorous, and distrustful of the security of

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their debts ; that in this extremity he applied to Stephen Bishop, and proposed to sell him the negroes. That Stephen Bishop executed a power of attorney to said Fannin, who was a nephew, and resided in the same county of Georgia with said Reuben, authorizing him to purchase said negroes ; that said Fannin did purchase said negroes by virtue of the authority contained in said letter of attorney, from the said Reuben Bishop. That said purchase was absolutely made by said Fannin, as the agent and attorney of said Stephen, without any trust or condition, except that it was made for the benefit of said Stephen Bishop. That from the best understanding and information respondents have, Stephen Bishop paid some money, and secured and paid some debts of Reuben, and conveyed some lands in Alabama to said Reuben, that belonged to him, Stephen Bishop.

The answer admits that the slaves were brought to Alabama by Fannin, but denies they were brought on the terms, conditions and trusts charged in the bill, or that they were delivered to Stephen Bishop on these terms, or that Fannin received them from Reuben Bishop on any trust different from the terms expressed in the bill of sale ; except that the conveyance was to Fannin, and was intended for the use and benefit of Stephen Bishop, and was executed to him, Fannin, to enable him to remove said slaves the more readily to Alabama, and to deliver them to Stephen Bishop, for his own use and benefit, which slaves Fannin had purchased with the funds of the said Stephen Bishop.

The answer denies that the consideration was not paid to Reuben Bishop, and on the contrary insists, that a full and fair consideration passed from said Fannin, as the agent of Stephen Bishop, to Reuben, for said slaves, in cash, assumptions of debt, and lands in Alabama. The answer admits that no consideration passed from Stephen Bishop to Fannin, at the time of the delivery of said slaves to Stephen Bishop by Fannin, as he was the agent of Stephen Bishop in the purchase, but denies that Stephen Bishop received said slaves upon the terms, conditions, and trusts set forth in the bill ; but that said slaves were received by said Stephen from Fannin, as his own property, and for which he had and was to pay the consideration expressed in the bill of sale. The

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answer admits that Stephen Bishop departed this life in 1840, and retained possession of the slaves, except the two alledged to be sold, and the boy Tom, which was given to defendant, Wood, in 1837; and that John Wood is the administrator of Stephen Bishop. That the negroes named in the bill have been divided between the children of Stephen Bishop, except Peter and Dinah, who were sold by Stephen Bishop in his lifetime, and Tom, given to Wood, but deny the existence of one alledged in the bill, by the name of Jane.

The answer admits the death of Reuben Bishop in 1826, or 1827, and that the defendants did not buy said slaves, but received them as the distributees and heirs at law of Stephen Bishop. That the complainants are the children, and heirs at law of Reuben Bishop, and may have intermarried as alledged in the bill, but do not admit that Mary Ann is twenty-one years old.

The answer further states, that said Fannin executed to said Stephen Bishop a bill of sale of said slaves, and upon the removal of Reuben Bishop to Alabama, that Stephen and Reuben had a full and fair settlement, at the house of Reuben Bishop, and in said settlement was estimated the value of said slaves, as also the land bought by said Reuben of Stephen Bishop, and then resold to said Stephen, and of all monies paid for said Reuben by said Stephen; and that on said settlement, said Reuben executed to said Stephen Bishop a bill of sale for said slaves, including an infant that had been born, bearing date about the 1st of March, 1826.

The defendants also state in their answer, that Alfred and James, two of the complainants were received into the family of Stephen Bishop, and supported and educated for ten years by Stephen Bishop; and that if the trust is established in their favor, that they should be held to account for their board, support, &c. But denies the right of complainants to call on the defendants for the slaves, or their value.

The chancellor considered that the trust was not so clearly ascertained as to authorize the interference of chancery, and dismissed the bill.

This is now assigned for error in this court.

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BELSER and HARRIS, for plaintiffs in error.

1. Where the testimony supports the allegations of a bill substantially, this is all that is required; and relief will not be denied because there is a discrepancy between the case as alledged and that proved, in some unimportant particular. *Eldridge, et al. v. Turner*, 11 Ala. 1050; *Gilchrist v. Gilmer*, 9 Ala. 985; *Graham v. Lockhart*, 8 Ib. 10; *Strange v. Watson*, 11 Ala. 325.

2. There was a delivery of the property, and a trust created for the benefit of the complainants. The evidence shows, that the donor parted with the dominion of the slaves for the use of the donees, and that the trustee recognized it to the fullest extent. See *Durrett v. Sewall*, 2 Ala. 669; *Walton v. Tims, et al.* 7 Ib. 473; *Eldridge v. Turner*, 11 Ib. 1055. To coerce the execution of a trust, the most stringent proof is not required. *Sledge's Adm'r's v. Clopton*, 6 Ala. 603; *Kennedy's Heirs v. Kennedy's Heirs*, 2 Ib. 622. And property received by one from another in trust, the former will be compelled to perform his engagement, and if he dies, his representatives cannot defeat it. *Dearman v. Radcliffe*, 5 Ala. 192.

3. The declarations, or admissions of a party, made after a sale or conveyance of property, are not admissible to defeat the conveyance, or a title derived through him, by the conveyance. *Bradford v. Bush*, 10 Ala. 386; *Powell v. Olds*, 9 Ala. 864; *Julyann v. Reynolds*, 8 Ala. 680; *Lee v. Hamilton, Adm'r*, 3 Ala. 529; *High v. Stamback*, 1 Stew. 24. The complainants, as the case is, claim by purchase, the defendants by descent; hence the declarations and acts of Reuben Bishop, after the delivery of the property, for the use of the complainants, and the acceptance of the trust by Stephen Bishop, cannot be received against them; but the declarations of Stephen Bishop, are evidence for the complainants, and are good against the defendants. 4 *Black. Com.* 2 vol. mar. page 201; 1 *Greenl. Ev.* § 189; *Norton v. Pettibone*, 7 Conn. 323; *Newman v. Kohr*, 4 L. & Rawle, 174; *Ivatt v. Finch*, 1 Taunt 141; *Lee v. Hamilton, Adm'r*, 3 Ala. 533.

4. The material part of Aldridge's testimony should have been excluded. The controversy, as appears from it, had

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been commenced previously between the parties, and this rendered it inadmissible. 1 Greenl. Ev. § 131; Bradford v. Hagerty, 11 Ala. 698.

5. On the entire testimony in the cause, the trust is established. The evidence is consistent with it, and inconsistent with the idea of a sale of the property. The execution of the bills of sale, and the money paid, are all reconcilable with the trust, as will appear most fully from the record.

HOPKINS, STORRS, and YOUNG, contra.

The bill alleges the plaintiffs were, as beneficiaries, entitled to the slaves, when the youngest child of their father attained lawful age. There is no allegation in the bill, that the youngest child ever attained lawful age. There is an allegation that all the complainants are of lawful age, but none that either of them was the youngest child of their father. The right therefore to demand the execution of the alleged trust is not shown by the bill. Story's Eq. Pl. § 257, 258, 263, 264; 10 Wheat. 189; 10 Peters, 178; 1 Ala. Rep. 333; 3 Ib. 421; 4 Porter, 297; 5 Ib. 345; Story's Eq. Pl. § 28.

The counsel of the parties made written admissions, among which is one, on the part of the defendants, that the youngest child was of age before the bill was filed. This evidence can have no effect upon the cause. The complainants make in their statement of their own case, their right to the possession of the property, to depend upon the time when the youngest child should become of lawful age, and omit to show that the youngest child ever attained that age. Story's Eq. Pl. § 28, 251, 258, 263, 264; 4 Porter's Rep. 297; 5 Ib. 345; 1 Ala. Rep. 333; 3 Ib. 421; 10 Peters, 178, 189; 3 Porter, 473.

The bill alleges, the trust the complainants claim the benefit of, was founded upon the absolute written conveyance made by Reuben Bishop to Fannin, which they charge in their bill bears date in September, 1825. There is no evidence of any conveyance made in September, 1825, by Reuben Bishop to Fannin. The evidence which relates to the alleged trust is irrelevant without proof of the absolute con-

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veyance, which the bill alledges was clothed with the trust described in it. All the evidence of the trust therefore is incomplete. Story's Eq. Pl. § 257, 258, 263, 264; 1 Ala. 333; 3 Ib. 421.

As the complainants have offered no evidence that the conveyance of September, 1825, under which they claim, was made, they have no other claim than as heirs at law of their father. They make no case in the bill for relief, as heirs, and if they had such a case, it would be disproved by the declarations of their father, under whom they would, in such a case, claim.

They have no evidence of the trust they alledge in the bill. As they have not proved the case made in the bill, upon which they rely to show a title independent of one by descent, and exempt from the effect of declarations made by their father, after he created the alledged trust for them, all his declarations, as proved, are competent evidence, because the testimony does not prove his right to affect his claim to what belonged to him, was inferred by the creation of the trust set up by the bill.

The evidence of the declarations of Stephen Bishop, that he held the property as trustee, is incompetent, because it is not alledged in the bill that he ever made such declarations. Such declarations from him are not put in issue by the bill. Story's Eq. Ev. § 263; Gresley's Eq. Ev. 288.

A court of chancery will not compel the execution of an agreement against the person who made it, unless the terms, as proved, are clear, definite and positive. 2 Story's Com. on Eq. § 764, 767, 769, 770; 3 Summer's Rep. 435; Kendall v. Almy, 2 Summer's C. C. Rep. 295. There is still more difficulty in enforcing it against an assignee, or heir of the party. 2 Summer's Rep. 295. The terms of the alledged trust, as shown by the evidence, are not of the character which have been mentioned, and are not referable to the absolute conveyance upon which the complainant's found the trust, the benefit of which they claim. 2 Story's Eq. § 764. The evidence is contradictory, as to the number of beneficiaries in the alledged trust.

Evidence of verbal admissions ought to be received with great caution. Greenl. Ev. § 200, and § 96, p. 108; 24

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Com. L. Rep. 448; 10 Vesey, 518. The weight of evidence is against the existence of any trust.

DARGAN, J.—It is too well settled by the decisions of this court, now to admit of doubt, that though a deed, or bill of sale be absolute on its face, parol proof may be received to show, that it was intended as a mortgage, or that it was executed and delivered upon certain trusts, not reduced to writing, but existing in parol, and which the grantee, or donee promised to perform; and these trusts may be shown by parol proof, and a court of equity will decree their execution.

In the case of *Kennedy's Heirs v. Kennedy's Heirs*, 2 Ala. Rep. 589, this court said, that parol proof may be received to show, that a party who received a deed absolute on its face, promised to dispose of the property in a particular manner, and if he refused to perform his promise, it was competent for a court of equity to decree its execution; and in the *Administrators of Sledge v. Clopton*, 6 Ala. —, this court held, that parol proof could be received in a court of equity, to show, that a bill of sale of slaves absolute on its face, was intended first as a security for a debt due by the maker of the bill of sale, to him to whom it was made, and when the debt was paid, then the party was to convey the slaves to trustees for the use of the wife of the vendor; and the proof being sufficient to establish these trusts, the court decreed their execution.

The ground upon which courts of equity undertake to establish trusts of this character, is that of preventing the fraudulent use of a deed; for although there is no fraud in the execution of the deed, if it be afterwards converted to a fraudulent purpose, or to one wholly different from the one intended by both parties at the time of its execution, equity ought to interpose, and prevent such an improper use of it, and establish the trusts for which it was executed. See 6 Paige's R. 147; 1 Dallas Rep. 424. It has long been the established doctrine of the courts of equity, that if a party prevent the execution of a will, in favor of *another*, by a promise to the testator, that if he will not make the devise, he will convey, or pay an annuity, to the party to whom the testator intended to devise the estate, or in whose favor he intended to charge

it, a court of equity would decree the execution of the promise against the party making it. See 3 Atk. Rep. 539; 2 Veasey & Beam's Rep. 259; 7 Sims Rep. 644; 14 Vesey's Rep. 290. In those cases, a promise made by the party who took the estate after the death of the testator, prevented the execution of a devise, in favor of the party intended to be benefited by the testator. This promise was not reduced to writing, and on the death of the testator, the estate vested absolutely, and unconditionally at law, in the promisor. But a court of equity, whose duty it is to prevent frauds, as against the party making the promise, or his heir, will hold the estate bound by the promise, and decree its execution. Now if a promise which prevents the execution of a deed, or devise, in favor of another, will be decreed a charge, or a trust upon the estate, should not a promise, or an agreement that induces the execution of a deed, or a devise, be also established in equity as a trust upon the estate? If a promise prevents the execution of a deed, we must decree the execution of the promise. If a promise in favor of another induces the execution of a deed, or forms its consideration, we must also decree its execution.

The question then is, on what terms, and conditions, did Stephen Bishop receive the slaves sought to be recovered. And here we will first examine the consideration of the bills of sale, executed to him. It is alledged, that in September, 1825, Reuben Bishop conveyed the slaves to James W. Fannin, to be conveyed by him to Alabama, and deposited with Stephen Bishop, for the use of complainants. The answer admits that Reuben Bishop did execute a bill of sale to Fannin, who was the agent of Stephen Bishop in the fall of 1825, but insists that it was an absolute purchase, and on a full consideration; but no witness says that he saw any money paid by Fannin to Reuben Bishop, and when Fannin executed a bill of sale for the negroes to Stephen Bishop, and delivered possession of them, no money passed. This was on the 20th January, 1826. On the first of March, 1826, Stephen Bishop being in possession of the negroes, received a bill of sale from Reuben Bishop, and then it is shown that he paid him \$500 in money, and Stephen Bishop gave him up his notes to the amount of \$1,200. This is the only ev-

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idence of actual payment, except that Reuben Bishop admitted full payment. But he died in 1826; and after Stephen Bishop was in possession of the slaves, he informed the witness Cook, that he had sent to get the negroes, and for this purpose a pretended debt was asserted against Reuben Bishop; that the object was, to prevent the wife of Reuben Bishop, or her father, from getting the control of the property, and that the whole arrangement, was to save the property for the children of Reuben Bishop, when they became of age. This witness had charge of the negroes, and delivered them to Fannin, under the instructions of Reuben Bishop. James B. Anderson, who is the nephew of Stephen and Reuben Bishop, says, that Stephen Bishop told him, that he received the negroes through Fannin, from Reuben Bishop, to hold for the benefit of Reuben Bishop's children. That Reuben Bishop drank hard, and managed his affairs badly, and that he sent Fannin to make a pretended purchase, for the purpose of bringing the negroes to Alabama, and save them for Reuben Bishop and his children; and that when Reuben Bishop's children became of age, they were to receive their negroes, and their increase. This was at the house of witness, in Wilcox county. The witness heard Stephen Bishop speak of the matter twice before the death of Reuben Bishop, and once after his death. After the death of Reuben Bishop, he heard Stephen say, that the property belonged to the children of Reuben Bishop, and that he had sold one negro, and taken another, to pay the expenses of law suits. Mrs. Glover, who is a niece of Stephen and Reuben Bishop, states that Stephen Bishop told her, that Fannin brought the negroes from Georgia, and that he held them in trust for his brother Reuben, and his children. Heard him speak of it repeatedly at his own house, and on the road from Mr. Tyus's to his house in 1833, which was after the death of Reuben Bishop.

Jesse Anderson states, that Stephen Bishop told him, that Fannin, as his agent, brought the negroes to Alabama; that he had a bill of sale for them, but had paid nothing except the expenses of law suits; that he was to hold the negroes for Reuben Bishop and his children; that he was to keep them separate from his own, until he got back all expenses,

and until Reuben's children became of age, and then they were to have them. The first time this witness heard Stephen Bishop speak of this was in 1825, or 1826, at another time in 1829, and again in Mobile in 1838.

Mary Anderson heard Stephen Bishop say, at her house in Wilcox, that Reuben Bishop's wife and her father were trying to get the property, and as Reuben could not manage his affairs well, he had taken it to save it for Reuben Bishop's children. In another conversation, he stated he had sent Fannin to Georgia for the negroes; that he had brought them to him, and that he had taken possession of the property, to hold it for Reuben Bishop's children, and when they became of age they were to have it.

These admissions were made, both before and after the death of Reuben Bishop, who died in 1826. To oppose this testimony, we have the declarations of Reuben Bishop, that he received full payment, and proof of \$500 actually paid, and the giving up of notes to the amount of \$1,200. But we find Reuben Bishop, from the testimony of the defendants in error, before his death in 1826, without money; and the answer states, that the land that Stephen Bishop sold to him, was re-conveyed back to Stephen, and the value of the negroes may be fairly stated at \$6,000. The answer also sets up the assumption, and payment of debts by Stephen, but there is no proof of the payment of any one debt. The two brothers lived on terms of friendship, and after the death of the one, Stephen Bishop makes the same acknowledgments, of the terms and conditions upon which he held the property. What is the legal effect of those admissions, after the whole transaction was completed, and Stephen Bishop in the undisturbed possession of the property? They show the character of the title, and possession of Stephen Bishop, and are binding on him and his representatives. See 1 Greenl. Ev. 228. It is impossible to doubt, that he made those admissions from the number, as well as the character of the witnesses who depose to them, and the relation that some of them bear to the parties. Why did he make them? Because they were true, and he intended to execute the trust. It would be unreasonable to suppose, that if he had purchased the slaves absolutely for his own use, he would have made

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those admissions to his own relatives. But he died before the trust was to be executed, and the defendants, not advised of the character of his title, resist the execution of the trust. But they are not purchasers for a valuable consideration, and the property in their hands is bound by it. It is true, that a court of equity requires strong, and stringent proof, before a decree will be pronounced declaring a deed absolute on its face, but conditional, or upon trust; and but little attention should be paid to the mere casual remarks of men about their property. Yet the often repeated declarations of Stephen Bishop, in regard to the character of his purchase of these slaves, and the persons to whom made, remove all doubt from the mind of the court, and hence it is our duty to declare the trust, so often declared by him in his lifetime.

But it is said, that as the trust is proved only by the admissions, and declarations of Stephen Bishop, and if the bill does not alledge those admissions and declarations, they cannot be received as proof. The rules of pleading, either in law or equity, are, that the facts on which the rights of the parties depend shall be alledged, and it is unnecessary to alledge the evidence that establishes these facts. Here the fact alledged is, that the bill of sale, though absolute, was intended by the parties as a trust, in favor of the complainants, and the declarations, and admissions, are but the evidence of this fact; and we think this is the correct rule of pleading. It is true, that in the exchequer in England, if the fact or gist of the bill is proved, and this can be established only by the admissions of the party, the court holds that those admissions should be averred in the bill. See 6 Price's Exchequer Rep. 240. And the same rule seems to be adopted by the Irish chancery court. But this rule certainly never has obtained in this State, nor have we been able to find a decision in any of the State courts, that recognizes the rule, that before the admissions of a fact can be received as evidence to prove it, these admissions must be averred in the bill.

The question did arise in the case of *Smith v. Burnham*, 2 Sumner's Rep. 612; and Judge Story, after reviewing the decisions in the exchequer, decided, that it was not necessary to alledge the admissions, or declarations, of a party which

were intended to be used as evidence to establish a fact, which was alledged. This has heretofore been the invariable practice of the courts of chancery of this State, and we see no reason why it should be now changed. We therefore come to the conclusion, that we can receive the admissions of Stephen Bishop, as evidence, although those admissions are not alledged.

The next question is, do those admissions prove the title, alledged by the complainants in their bill?

The bill alleges, that Reuben Bishop, on the 25th of September, 1825, executed to Fannin a bill of sale of the slaves, for the purpose of conveying them to this State, to be deposited with Stephen Bishop, to be by him held in trust, for the benefit of the complainants, the children of Reuben, until the youngest of the children became of age, and then to convey the slaves, with their increase, to the complainants, the children of said Reuben.

The answers admit the execution of the bill of sale to Fannin, but deny the trust; and the only evidence of the trust are the admissions of Stephen Bishop, before alluded to. Those admissions do not prove, that Stephen Bishop was to hold the slaves for the exclusive use of the complainants, until the youngest child of Reuben Bishop became of age; but if Stephen Bishop held said slaves, on any trust, (which may be doubted,) until the youngest child of Reuben Bishop became of age, the trust was for Reuben Bishop and his children; hence the complainants cannot recover the hire, or the profits of the slaves, before the youngest child became of age, for they certainly do not, up to that period of time, prove an exclusive trust in their favor, and by the bill, an exclusive trust is alledged. But all the witnesses agree, that when the youngest child of Reuben Bishop became of age, then the slaves and their increase were to be conveyed to the children of Reuben Bishop. An exclusive trust in favor of the complainants, is fully established by the proof after the youngest child became of age, and we are of the opinion, that this trust, under the allegations of this bill, ought to be enforced. It is true, that in order to entitle a complainant to relief, his allegations and proof must correspond, but in this case, two trusts are alledged. The first is, that Stephen

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Bishop should hold the slaves for the use of the complainants until a fixed period, and then he was to convey them to the complainants. The latter trust alone is proved, but it is proved as alledged, and we see no reason why this should not be enforced, because the complainants fail to prove a trust in their favor before that time.

Another objection is, that it is not alledged, that the complainants are the only children of Reuben Bishop, nor is it alledged that the youngest child has arrived at the age of twenty-one. This is a mistake: the bill shows that the complainants are the only children, and also alleges that Mary Ann, the youngest, is of age, and these allegations are shown to be true, by the admissions made of record upon the trial in the court below.

After the best examination we have been able to give this case, and with an anxious wish to arrive at the justice of it, we are compelled from the proof, to decree that the complainants, from the time the youngest became of age, are entitled to the slaves, except the two sold by Stephen Bishop to defray the expenses growing out of the removal of them from Georgia; the same proof that establishes the title of the complainants, to wit, the admissions of Stephen Bishop, shows that he sold two of the slaves to defray those expenses. The complainants are not entitled to recover for them. But the complainants are entitled to recover of the defendants, the other slaves with their increase, and are also entitled to recover the value of the use, or hire of the slaves, from the time the youngest child became of age. To ascertain this, a reference to the register is necessary. The decree of the chancellor is therefore reversed, and the decree that should have been rendered by the chancellor, must be here rendered.

It is therefore ordered, adjudged and decreed, that the defendants deliver up to the plaintiffs the slaves sought to be recovered by the bill, and which were in their possession at the time the bill was filed, together with their increase, if

any have since been born ; and the cause is remanded, that it may be referred to the register, to take an account of the yearly value, and profits of the slaves, from the time the youngest child of Reuben Bishop became of age ; and if it should appear that any of the slaves have died since the filing of this bill, it will be referred to the register to take an account, and state the value of such slave at the time the bill was filed.

DONNELL v. JONES, ET AL.

1. When an attachment is wrongfully and maliciously sued out, the defendant is not confined to the remedy afforded by the bond, but may sue in case, for the injury he has sustained, before the attachment suit is determined.
2. It is no answer to a declaration in case, for wrongfully and maliciously suing out an attachment, that the defendant had good reason to believe, and verily did believe, that the plaintiffs were about to dispose of their property fraudulently, with intent to avoid the payment of the debt sued for ; and therefore a plea to this effect, setting out the facts upon which such belief was predicated, is bad on demurrer.
3. The fact that a defendant sued in attachment, is insolvent, is proper to be given in evidence, as a circumstance to be considered by the jury, in ascertaining the damages, but is no answer to the action, and therefore a plea relying on it as such, is bad on demurrer.
4. Objections to testimony taken thus, in the court below, to exclude "the latter part of the answer of J D W, to the 4th interrogatory,"—"to exclude so much of the answer to the 5th interrogatory, as was matter of opinion,"—"to exclude all and every part of the testimony, which was offered by the plaintiff, showing their credit was impaired by suing out the attachment,"—and a general objection to the interrogatories to a witness, "to all and every interrogatory inquiring of specific damage, or loss, sustained by plaintiffs, and to all answers on that subject, and to all opinions of the witness," are too vague, and indefinite to require the inferior court to act, or to enable an appellate court to supervise it.
5. A leading question is one which suggests to the witness the answer desired, but a discretion must be left to the court trying the cause, to be ex-

exercised in reference to the character of the investigation, the condition and disposition of the witness, and the peculiar circumstances attending the examination.

6. The damages which a mercantile firm, composed of three individuals, can recover, in an action for wrongfully and maliciously suing out an attachment, must be for an injury done to their joint business, and must not only be the natural, proximate, legal result, or consequence of the wrongful act, but must affect the joint business, or trade of the partnership. Injury to the private feelings of the individual partners, is not a proper subject of inquiry.
7. Proof of special damage, arising from the loss of reputation, credit, or business, or the withdrawal of particular customers, cannot be made, unless such special damage is averred in the declaration.
8. A statement by a witness, "that from his acquaintance with the business of the plaintiffs, the issuing and levying of the attachment, had the effect of destroying their credit and standing as merchants, and preventing them from carrying on their business, and forcing them into an assignment," is not admissible as evidence, being the opinion of the witness, or his deduction from facts, and not a statement of the facts themselves.
9. A loss accruing from a forced sale of goods, under an assignment, is not a natural, or proximate consequence of the issue and levy of an attachment by the creditor, previous to the making of the assignment by the debtor.
10. Under the general averments of the declaration, evidence is admissible to prove the general loss of credit, and mercantile character, but not to prove the loss of any particular customer.

Error to the Circuit Court of Autauga. Before the Hon. G. Goldthwaite.

CASE by the defendants in error, for the wrongful and malicious suing out by the plaintiff in error, of an ancillary attachment, by which their reputation and credit as merchants were destroyed, &c. See the declaration at length in the opinion of the court.

The defendant pleaded five pleas, the two first of which the plaintiff took issue upon, and demurred to the third, fourth, and fifth, which are set out *in extenso* in the opinion. The court sustained the demurrer to these pleas.

From a bill of exceptions, it appears, the plaintiffs were merchants, and partners, in the city of Montgomery. That the plaintiffs were indebted to the defendant, in the sum of \$5,954, due by two promissory notes, upon which he commenced suit, and afterwards making the necessary affidavit,

sued out an ancillary attachment, which was levied on the stock of goods, wares and merchandize of the plaintiffs. The plaintiffs offered as evidence certain depositions of merchants residing in the cities of New York, Mobile and New Orleans.

The defendant then made a "general objection to all and every part of the testimony which was offered for the plaintiffs, showing the credit of the plaintiffs was impaired by suing out the attachment, and moved to exclude all such testimony from the jury, which objection the court overruled. He then made special objections to particular portions of the testimony so offered, as follows :

Defendant objected to the reading of the latter part of the answer of J. D. Winthrop, to the 7th interrogatory. The interrogatory reads thus: "Please state, if, from your acquaintance with the business of R. Jones & Co., as nearly as you can, whether or not it was impaired and injured by the suing out and levy of the attachment by Andrew Donnell. If yea, how was it injured, the nature of the injury, and the extent of said damage and injury then done said firm, by the issuance and levy of said attachment?"

"Not having heard of the attachment spoken of, I cannot say whether the business of R. J. & Co. was injured or impaired thereby, but the rumor of their failure was very great injury to their credit here." The objection was overruled.

Defendant objected to the reading of the answer of T. Bates to the 6th interrogatory, which objection was overruled.

The interrogatory reads thus: "Please state whether, or not, you are acquainted with the manner in which plaintiffs carried on their business in the city of New York. Whether or not their purchases were made on a credit, what circumstances are regarded as giving facilities to southern merchants seeking to buy goods in the city of New York?"

The answer is—"I did not know what capital R. Jones & Co. had, but knowing them to be upright and honest young men, and knowing the good business capacity of Mr. Jackson, I trusted them," &c.

The defendant also objected to the answer of J. H. Parsons to the same interrogatory, which objection was overruled.

The answer reads thus: "The manner in which they have been injured, is by the total ruin of their credit, and, indeed, their character has also been impaired."

Plaintiffs offered to read interrogatories which they had propounded to J. A. M. Battle, and the answers thereto. Defendant had filed objections at the time of crossing them, thus: "Defendant objects to any and every interrogatory inquiring of specific damage or loss sustained by plaintiffs. And to all answers on that subject, and to all opinions of this witness. And therefore objected, on the trial, to the answer to the 5th interrogatory, which reads—"From your acquaintance with the business of plaintiffs, please state how it was affected by the suing out and levy of said attachment. If any damage was sustained thereby, what damage, and to what extent. Please state the same fully."

The answer reads—"From his acquaintance with the business of plaintiffs, the issuing and levy of the attachment had the effect of destroying their credit and standing as merchants, and preventing them from carrying on their business, and had been seriously damaged in character and business, and they thrown out of business perhaps for several years." It caused great damage to the character, and ruin to the credit of said plaintiffs."

Plaintiffs offered to read interrogatories propounded by them to L. W. Phillips, and the answers thereto, to which defendant had filed, at the time of crossing, this objection: "The defendant objects to so much of the latter part of 4th direct interrogatory as requires witness to state the effects produced on the business affairs of plaintiffs by levy of the attachment referred to in this interrogatory, on the ground, that this is calling on the witness, either for his opinion on the facts, or for his conclusions from the facts."

The 4th interrogatory reads thus: "Have you, or have you not, any knowledge of an attachment having been levied on the stock of goods, &c., of plaintiffs, on or about the 1st January, 1845, at the suit of A. Donnell. If yea, state fully all you know concerning the levy of said attachment, and its effect on the business affairs of R. J. & Co."

Defendant also objected to the answer, which reads thus: "The levy of the attachment created the greatest surprise to

the members of the firm, to myself, and to the community generally. Planters with whom plaintiffs had dealings in cotton, and who would have readily sold their crop to the plaintiffs, would not sell any cotton to the plaintiffs after they heard of the issuance of the attachment."

Defendant also objected to reading the answer of this witness to the 5th interrogatory, which reads thus: "Did there, or did there not, any injury result to the business affairs of said firm in consequence of said attachment, any if any, state what injury, and how the injury accrued, its extent, and your means of knowing. Answer fully."

The answer reads—"Injury accrued to their business, inasmuch as the regular and large customers of the plaintiffs, with few exceptions, left off their dealings, and transferred their business to other houses, previous profits could not be realized, and goods were sold at the price they cost in New York, by order of the assignee, in order to reduce the stock on hand, &c., also, loss by diminution of profits, I place at from 30 to 50 per cent."

Defendant also objected to the reading of the answer of J. Jackson to the 4th interrogatory. "If you have any knowledge of the situation of the business affairs of plaintiffs, before and after the levy of said attachment, please state what it was, as fully and accurately as you can, up to 15th April, 1845."

The answer reads—"That custom and trade were diverted from the concern to other places, and that it became difficult to sell the goods, even at New York prime cost."

Defendant also objected to the answer to the 5th interrogatory, which reads thus? "Have you any knowledge of any damage or injury resulting to the mercantile affairs of plaintiffs, by the issuance and levy of said attachment, up to 15th April, 1845. If yea, please describe the same fully and particularly, how and in what manner, and to what extent said damages, if any, accrued, and your opportunity of knowing, &c."

The answer reads—"That whereas, before the 1st January, 1845, they could, of my own knowledge, negotiate for large sums of money upon their own credit; they could not raise any monies subsequent to the issuing of the attachment, upon their credit."

Defendant also objected to the reading of the answers of H. K. Bagget, to the 7th interrogatory, which reads thus: "Please state, from your acquaintance with the business of said R. J. & Co., as nearly as you can, whether, or not, it was injured and damaged by the issuance and levy of said attachment, by said A. Donnell. If yea, how was it injured, the nature and extent of said injury and damage then done to said plaintiffs, if any."

The answer reads—"Their business was injured by the total ruin, and forcing the house into an assignment, and the consequent forced sales of their property."

All which objections were overruled, and defendant excepted.

The defendant also objected to evidence of special damage. The court overruled the objections, and the defendant excepted. It was in proof, that the plaintiffs, two days after the attachment issued, made an assignment of their effects.

The defendant moved for the following charges: 1. That if the plaintiffs were insolvent at the time the attachment issued, they were not entitled to damages for injury to their credit.

2. If the plaintiffs' credit was based alone on their integrity, and ability to transact business, then the loss of their credit is not the subject of damages in this action.

3. Under the declaration in this case, the plaintiffs are not entitled to damages for the levy of the attachment, because no damages are alledged to have been sustained to the goods themselves, nor loss or injury to the plaintiffs, by being deprived of the possession of the goods.

4. If the defendant had good reason to believe, and did believe, that plaintiffs were about fraudulently disposing of their property, to avoid the payment of his debt, this is a circumstance to be taken into consideration by the jury in mitigation of damages.

5. That if the defendant was not actuated by malice, in suing out the attachment, plaintiff could only recover for actual injury to the goods themselves, and if the goods were not taken out of his possession, he could only recover nominal damages.

The court refused to give these charges, and charged, that

they could recover for the actual injury they had sustained, by the act of the plaintiff, if wrongful—and for injury to their mercantile business—but if the plaintiffs, at the time the attachment issued, were about fraudulently to dispose of their property, with intent to defeat the plaintiff's debt, they must find for defendant. That if the plaintiffs were insolvent at the time the attachment issued, yet if, by the profits of the mercantile business they were engaged in, they might probably have extricated themselves from such insolvency, it was proper to take into consideration the injury done to their credit, as merchants, by the suing out of the attachment, should they find for the plaintiff. That if the plaintiffs had good reason to believe, at the time the attachment issued, that the plaintiffs were about fraudulently to dispose of their property, to avoid the payment of his debt, though it would not reduce the actual damage sustained, it should prevent them from finding vindictive damages.

The jury found for the plaintiffs ten thousand dollars, for which judgment was rendered.

The defendant excepted to the opinions and charges of the court, and now assigns for error, the matters of law arising out of the bill of exceptions, and of the demurrers sustained to his pleas.

YANCEY and T. & J. WILLIAMS, for plaintiff in error.

Special damage cannot be proved unless specially alleged in the declaration, even in an action where the words are actionable in themselves; and *a fortiori* if they are not. 1 Chitty's Pl. 396, 397, 399; 2 Greenl. Ev. § 89, 254, 420; 2 Phil. Ev. 248; 2 Starkie's Ev. 446, 466; 1 Starkie on Slander, 21, 23, 24, 42, 43, 441, 445; Buller's N. P. 7; Leigh's N. P. 1298, 1388; De Forrest v. Leete, 16 Johns. 122; Johnson v. Robertson and wife, 8 Porter, 486; Dickinson v. Boyle, 17 Pickering, 78; Herrick v. Lapham, 10 John. 281; Hartley v. Herring, 8 Term, 130.

Damages, not the natural and proximate result of the act complained of, cannot be recovered. Sedgwick on Dam. 74-5-8, 88, 98-9; 2 Greenl. Ev. 210, § 256; 1 Starkie on Slander, 204; Deyo v. Wagonner, 19 John. 241.

Damages which are not wholly attributable to the act

complained of, cannot be recovered. 1 Starkie on Slander, 205; 2 Starkie's Ev. 466.

A mere apprehension of damage, or ill consequence, cannot constitute special damage, and is not ground for a recovery. 1 Starkie on Slan. 203.

No proof can be received of damage done to goods by the act complained of, at a time when the legal estate in said goods was not in plaintiffs. Squire v. Gould, 14 Wendell, 159.

Evidence of the loss of customers by the act complained of, can only be made by the customers themselves. Ashley v. Harrison, 1 Esp. R. 48; Tilk v. Parsons, 2 C. & P. 201; Johnson v. Robertson and wife, 8 Porter, 486; 2 Starkie's Ev. 466.

Opinions of merchants as to the effect of the act complained of, upon a merchant's credit, inadmissible. 1 Greenl. Ev. § 441; Lincoln v. S. & S. R. R. Co. 23 Wend. 425; P. & M. Bank of Mobile v. Borland, 5 Ala. 531, 546; Andrews & Bro. v. Jones, 10 Ala. R. 460; Herrick v. Lapham, 10 John. 281.

In an action of this character, by co-partners in trade, damages can only be recovered for injury done to them in matters in which they are jointly interested. Haythorn v. Lawson, 3 C. & P. 196; Goldstein v. Foss, 2 Ib. 253, note; Story on Part. § 257.

Credit, is "trust—transfer of goods in confidence of future payment." Webster; Bouv. L. Dic.

Character, is "the peculiar qualities impressed by nature, or habit, on a person, which distinguish him from others." Webster.

J. A. CAMPBELL and H. W. HILLIARD, contra.

The demurrers to the pleas of the defendant were properly sustained. Wilson v. Outlaw, Min. R. 367; Kirksey v. Jones, 7 Ala. R. 622; Pitts v. Boroughs, 6 Ala. 733; 9 Ala. R. 407, 825; 11 Ib. 492; 10 B. & C. 249.

Words or acts which tend to the injury and disparagement of a person in his trade or profession, and which proceed from the malice of the party employing them, furnish the grounds

of an action to the party injured. It is not necessary to aver or to prove damage. Damage is implied by law. 7 Conn. Rep. 257; 1 Lord Ray. 692; 2 Ib. 1480; 7 Meis. & W. 423; Cro. Jac. 499; 1 Binn. 178; 5 Wend. 263; 1 Pick. 524; 5 John. 476.

The sources of damage to such a party, are stated in the precedents furnished by Wentworth and Chitty, and are stated by Sedgwick. They are the damages sustained by the party in his business, credit, feeling, social intercourse and property. 8 Went. Pl. 313; 2 Chit. Pl. 641, 617; Sedg. 21; 3 Mass. 546.

The damages may be shown by evidence. The object of the evidence should be to determine their nature and extent, and whatever is pertinent to the issues is competent. In the absence of such evidence, the law would only imply nominal damages. 1 Rawle, 25; 1 Gall. 429; 1 Salk. 19; 9 Ala. 173; 3 Ib. 206; 24 E. C. L. R. 87.

The objections of the plaintiff, that loss of business—loss in the sale of goods—loss of credit and custom, and of mercantile character—are grounds of special damage, and that the manner of the loss must be specially stated, is an inaccurate view of the law on this subject. Special damages are the particular and unusual effects which follow from an injurious act. They are generally, in cases of defamation, the consequences of a reiteration of the original wrong, by some third person, moved by the impression that the wrong has made upon him. In such cases, the law supposes the person injured unable to prove special damages, and when he desires to do so, imposes the obligation of giving notice to the defendant of his intention. When the wrong implies loss to character, property, credit, and business, and the loss does not result from the isolated acts of a few persons who can be named, the damages may be recovered under the general averments. Chit. Pl. 395-6; 11 Price, 19; 1 Esp. 48; 1 Strange, 666; 8 T. R. 130; 17 Wend. 71; 3 Mass. 546.

The plaintiffs were entitled to recover damages for the prospective injury they might sustain in any of these capacities. 47 Eng. C. L. R. 568; 7 Hill, 61; Sedg. 108.

The objections that the evidence consists of hearsay evi-

dence, and of opinions upon the declarations of others, are not sustained by the facts. The points involved in the issue, required the court to inquire of the mercantile character, reputation, and business of the plaintiffs—and the effects produced on their character, reputation, and business, by the act of the defendant. To ascertain the nature and extent of the injury—the nature and extent of their business—the quality of the plaintiffs' dealing, their connections, must be ascertained, and the effects of the defendant's acts upon these. An effect upon the credit of the plaintiffs, by a particular act, can only be ascertained by disclosing the state of the public mind in reference to the credit of the party, after the act complained of, and the connection between that act and the state of the public mind. 7 Ala. Rep. 784; 10 Ib. 288; 2 Dev. 63; 2 Pick. 304; 10 B. & C. 527.

The general loss of custom—diminution of business—sacrifice of trade—are all admissible inquiries, and these facts may be ascertained by the withdrawal of particular customers, not as evidence of special damages, but as conducing to show the general damage, and in connection with such proof. 11 Price, 19; 8 T. R. 130.

Objections to interrogatories cannot be taken for the first time at the hearing. The party producing the witness is entitled to notice of the objection, that he may modify his question. 2 Ala. 379; 10 Ib. 589. This principle answers the objections to the first set of interrogatories.

General exceptions to questions, or answers, without stating any ground of objection, will be overruled. 10 Ala. 453; 2 S. & P. 28.

These authorities apply to the exceptions to the testimony of Thomas Bates, Cyrus Phillips, to some of the exceptions to the testimony of Battle, to portions of the exceptions to the testimony of Lewis Phillips, and to the general objections.

Objections taken to testimony at the trial, are entire in their nature. The whole testimony excepted to must be incompetent, or the objection will be overruled. The court is not required to separate the competent from the incompetent testimony. 2 Ala. 280; 4 Ib. 265; 7 Ib. 269.

CHILTON, J.—1. It is a well established rule of pleading, that a demurrer brings the whole record before the court, and that the court upon an examination of the record, will give judgment against the party who committed the first fault. *United States v. Gurney, et al.* 4 Cranch, 333; *Ansley v. Mock*, 8 Ala. Rep. 444. This rule applies to the case under consideration, and imposes upon us the necessity, not only of considering the sufficiency of the pleas to which the demurrer was sustained, but also, the sufficiency of the plaintiff's declaration; for if that be wanting, the demurrer should have been visited upon the plaintiff as having committed the first fault. 1 Porter's R. 107.

The declaration avers, that Richard Jones, Geo. T. Jackson, and Samuel Jones, merchant co-partners, under the name and style of Richard Jones & Co., were engaged in the mercantile business, in the city of Montgomery, and had committed no act of fraud whatever, nor contemplated any fraudulent sale of their goods, wares and merchandize, and not being liable or subject to have a writ of attachment issued out against them, but being in great regard, reputation and credit among all persons with whom they had dealings, the defendant, well knowing the premises, but falsely, wickedly and maliciously intending to aggrieve and oppress the plaintiffs, to bring them into disgrace, and put them to great expense, &c., and to cause them to be regarded as insolvent, dishonest, and wholly unworthy of credit, and to cause them to give up their business, and to suffer their goods, &c., to be seized, &c., did make an affidavit, which, with the attachment, is set out in the declaration, and in which said Donnell swears to the amount due him from Richard Jones & Co.—that he had instituted suit to recover the same, and that said firm was about fraudulently disposing of their property, to avoid the payment of the debt sued for. After averring the levy of the attachment, and seizure of the goods of defendants, in virtue of it, the declaration proceeds, “and the said plaintiffs, by means of the suing out said attachment against the estate of the said plaintiffs, and the several proceedings had thereon, have lost their credit and reputation, with and amongst all their friends, neighbors and acquaintances, and all persons with whom they had business transactions, and have lost the

use, benefit and advantage of their said business, and forced wholly to abandon it, and to expend large sums of money in defending against said attachment, and by means of the premises, have been wholly ruined in their circumstances," &c.

2. On the part of the plaintiff in error, it is insisted that the action was misconceived—that the plaintiff below should have brought his action upon the bond given by Donnell, in order to procure the issuance of the attachment, as required by the statute. Dig. 61, § 34. We do not agree with the counsel in this position. The act of 1837 provides, that when any original attachment shall have been wrongfully or vexatiously sued out, the defendant may at any time commence suit against the plaintiff suing out the same, and recover any damages which he may have sustained, or to which he may be entitled on account thereof, whether the suit commenced by attachment be ended or not. Dig. 61, § 32. This statute has been construed to embrace the suing out of ancillary as well as original attachments—a construction which has for some time been acted upon in our courts, and from which we do not feel at liberty now to depart. See *Kirksey v. Jones*, 7 Ala. Rep. 622; *McCullough, et al. v. Walton*, 11 Ala. 492. An action on the bond required to be given on the issuance of original attachments, is governed by the same rules as an action upon the case. *Hill v. Rushing*, 4 Ala. Rep. 213; *Herndon v. Forney*, *Id.* 243. If the attachment was wrongfully sued out, then the defendant in the attachment can only recover for the actual damage he has sustained, but if not only wrongful, but vexatious, or (which is the same thing) malicious, then vindictive damages may be recovered. *McCullough v. Walton, supra*.

Admitting, that at the common law, no action lies for the misuse of legal process, unless the party acted from malice, or was guilty of fraud or oppression, or gross negligence, and that the statutes designed to enlarge the common law remedy by extending the right of action to the *wrongful* suing out, in cases where the ingredient of malice is wanting, still, the argument avails nothing for the plaintiff in error. It is perfectly clear, the statute did not design to take away the common law remedy. That it is cumulative, and does not

restrict the remedy of the injured party to the attachment bond, and inasmuch as the statute inhibits the defendant in attachment from putting in issue the grounds upon which it is sued out, it follows he is not bound to wait until the attachment suit is determined, but may institute his suit at any time, to recover such damages as he has sustained by the wrongful and malicious use of the process of the court. It is unnecessary for us to re-examine the point, which appears to be settled in the case of *Kirksey v. Jones*, as to whether, if the party sues merely for the *wrongful* suing out the attachment, his action must be on the bond, and not case, as the point does not arise in the case before us, which is not merely for the wrongful, but the malicious act of the plaintiff in error.

The effect of a different rule, however, in connection with our former decisions, will best show the propriety of that point in the adjudication. Suppose, as insisted upon by the counsel for the plaintiff in error, the injured party is confined to his action upon the bond executed upon the issuance of the ancillary attachment. The bond, unlike that required in original attachments, is "to pay all such damages and cost as the party defendant may sustain by the *wrongful* suing out said attachment," and is to be in the penalty of *double the amount sworn to be due*. Clay's Dig. 62, § 34. No more than the penalty of the bond can be recovered in an action of debt or covenant upon the bond itself. *Herndon v. Forney, et al.* 4 Ala. Rep. 247. Now, if an individual, incited by the most selfish and malignant feelings which competition in business may serve to engender, should obtain an attachment upon a note for \$50 on grounds falsely and maliciously alledged, involving moral turpitude, and thus succeed in his design of ruining his rival, the injured party, in the prostration of his credit and business, may have sustained damage to the amount of \$10,000, as a natural and proximate consequence resulting from such wrongful and malicious act. The common law in such case, allows the jury, if they choose, to make an example of the defendant, when sued for redress, and will allow them to go beyond the actual damage the party has sustained. But what could he recover if confined to the bond: One hundred dollars! We

cannot intend that the legislature designed the statute thus to operate, by taking away the common law remedy. We do not regard the declaration as counting upon the loss of character of the plaintiffs as merchants, resulting from the words in the affidavit, charging an intention to commit a fraud in avoiding the payment of the debt sued for. It is certainly true that words, used in the course of judicial proceedings, cannot be made the foundation of an action.

In this case, however, the *gravamen* of the action is the injury which accrues from the wrongful and malicious suing out the attachment. The injury to the credit, &c. of the firm is but a consequence of that act, or is stated in the declaration as inducement. The declaration, we think, is in accordance with the forms found in the most approved works on pleading. See 2 Chitty's Pl. marg. p. 619, 620; 8 Went. Pl. 313. But if it were true, that the plaintiffs could not recover for any damage resulting from loss of character and credit, (and we shall have occasion to notice this point more particularly hereafter,) still, we think, that as the declaration sets forth other injurious consequences resulting from the tortious act complained of, the court might regard it as sufficient, rejecting as surplusage the averment of consequential damage from loss of character, &c. 1 Chitty's Pl. 196; Evans v. Watrous, 2 Porter's Rep. 205. And although a connected history of the injury the plaintiffs below may have sustained, contained matter proper for two counts, still, it may be embraced in one, (Ib.; Abercrombie v. Knox & Co. 9 Por. Rep. 629,) since by our statute special demurrers have been abolished. Digest, 334, § 119; Castles v. McMath, 1 Ala. Rep. 326.

Various other objections have been taken to the declaration, which we will notice more fully when we come to consider the admissibility of the testimony which was objected to on the part of the plaintiff in error.

4. The demurrer was properly sustained to the third, fourth and fifth pleas of defendant below. The third plea attempts to justify the issuance of the attachment, upon the ground "that the plaintiff in error had good reason to believe, and did verily believe, that the said Richard Jones & Co. were about to dispose of their property fraudulently,

with intent to avoid the payment of the debt sued for," &c. The grounds of such belief, as stated in the plea, are—1. That said Richard Jones had informed defendant below that the firm of R. J. & Co. was unable to pay its debts then due and unpaid. 2. That before the issuance of the attachment, said Richard informed him, if the said firm were driven by their creditors, they would make an assignment to Messrs. Rives, Battle & Co. of Mobile, to whom they were indebted to about \$24,000. 3. And because said Richard Jones, before the suing out the attachment by the plaintiff in error, informed him "that the pecuniary difficulties under which said firm labored had been made known to said Rives, Battle & Co., but should not be extended to any of the creditors save the plaintiff in error." The fourth plea asserts the insolvency of defendants in error at the time the attachment was sued out, and sets forth numerous large demands existing and unpaid against them. The fifth is but a repetition of the third, omitting the reasons upon which the party's belief was founded.

In *Alexander v. Hutchison*, 9 Ala. Rep. 825, the circuit court had charged the jury, "that if the defendant, when he made the affidavit, had good reason to believe the fact to be as therein stated, such belief, founded on sufficient reason, in law justified the suing out the attachment, and in that event, the jury should find for the defendant." This court held the charge erroneous, and reversed the cause, deciding that the plaintiff in the attachment sued it out at his peril. If the plaintiff in good faith believed the cause stated in his affidavit existed, and acted without any malice, he would, as we have before stated, be responsible only for the actual damage which the defendants in the attachment had sustained; but if, in addition to its being wrongfully sued out, it was also vexatious, or malicious, then exemplary damages may be superadded. The principle settled in the above case, as well as the case of *Kirksey v. Jones*, 7 Ala. Rep. 627, is conclusive against the third and fifth pleas. The fourth plea is no answer to the declaration. That the firm of Richard Jones & Co. was unable to pay all the demands against it, could not justify a resort to the extraordinary process of attachment. The fact of insolvency was proper to be given in evidence, as

a circumstance to be considered by the jury in ascertaining the damage the defendants in the attachment had sustained by the wrongful and vexatious suing out of the attachment, as affecting the credit of the firm, but certainly could constitute no bar to a recovery, else an insolvent man could never sue for injury done to his property, by a wrongful and malicious resort to the process of the court; and as his creditors in such case could not maintain an action, the anomaly would be presented, of a grievous wrong and consequent injury, without any remedy.

The plea responds merely to *one* of the facts stated in the declaration in aggravation of damages, when it purports to answer and bar the whole action, (1 Chitty's Pl. 453, 455; Nevins v. Keeler, 6 Johns. Rep. 63; Hallet v. Holmes, 18 Ib. 28,) the gist of which action is, the injury consequent upon the wrongful and vexatious suing out the attachment. 1 Saund. 28, et n.; 1 Hen. Bl. Rep. 555; 2 Camp. Rep. 175.

5. We will next address ourselves to the various points, so elaborately discussed at the bar, arising out of the admission of testimony in the court below, as shown by the bill of exceptions. These perhaps we may consider with greater perspicuity under the following classification: 1. Such objections as this court may not properly regard as grounds for reversal, the same not having been properly made in the court below. 2. Objections which question the admissibility of the proof, on the ground that it was matter of opinion. 3. That a portion of the proof admitted, was secondary hearsay evidence. 4. And lastly, that proof was allowed of damage for which in this action, and under the state of the pleadings, the plaintiffs below were not entitled to recover.

In Towns & O'Brien v. Butler & Alford, 2 Ala. Rep. 378, it was held that objections to questions, on the ground that they are leading, must be made when the questions are propounded, and cannot be made for the first time at the trial. See also Kyle & Gunter v. Bostick & Sherrod, 10 Ala. Rep. 589. So, if a general objection be made to an entire interrogatory, when part of it was proper, the court is not bound to distinguish and separate the competent from the illegal part, but may overrule the objection. Borland v. Walker, et

al. 7 Ala. Rep. 269. And where objection was made to the whole deposition, "because of various defects apparent from the notice, caption and body of said deposition," no defects being specifically pointed out, it was held the court was not bound to cast about in search of the grounds for such undefined objections, and very properly overruled the motion to exclude. *Wallace v. Rhea & Ross*, 10 Ala. Rep. 251; *Milton v. Rowland*, 11 Ala. Rep. 732. Neither will the court entertain a motion, made for the first time *at the trial*, to suppress an entire deposition which has been taken according to the statute, upon the ground that some of the interrogatories are not sufficiently answered. *Carter v. Manning & Jackson*, 7 Ala. Rep. 851; *Spence v. Mitchell*, 9 Ala. Rep. 744. These rules are designed to discourage technical objections, and to advance the ends of justice by preventing surprise to the opposite party, and to enable the court to pass a considerate judgment upon the matter to which its attention must be directed by some specific exception. They apply to the medium through which the evidence is submitted to the jury, but not to the *legality* of the testimony itself; for it often happens, the interrogatories may be wholly unexceptionable, yet the witness may embrace in his answers testimony wholly illegal, and in such case, "it is the duty of the court to protect the jury against the admissibility of illegal testimony, no matter through what medium it is offered." See *Wall v. Williamson*, 11 Ala. Rep. 826, 834.

Applying the principles settled by these adjudicated cases (and which we regard as recognizing the correct rules of practice) to the exceptions before us, we think the court below very properly refused to allow the motion to exclude "the latter part of the answer of John De Winthook to the fourth interrogatory," and the motion "to exclude so much of the answer to the fifth interrogatory as was matter of opinion." These motions, as well as the proposal "to exclude all, and every part of the testimony which was offered by the plaintiffs (below) showing their credit was impaired by suing out the attachment," were too general, vague and indefinite,—imposing upon the court the burthen which be-

longed to the counsel, of sifting and scrutinizing the proof, to ascertain what portions came within the scope of the exceptions. The general objection made to the interrogatories propounded to the witness Battle, "to all and every interrogatory inquiring of specific damage or loss sustained by plaintiffs, and to all answers on that subject, and to all opinions of the witness," falls within the same category, and the court below was not bound to regard it, for the reasons above stated. The foregoing are the only objections from the investigations of which we consider ourselves relieved,—and we turn to those which are properly presented.

In this connection, we may as well dispose of the question raised by the counsel for the plaintiff in error as to the sufficiency of the interrogatories propounded to the witness Bates. We do not regard them as obnoxious to the objection of being leading. The witness is asked "if he has knowledge of the mercantile business of the plaintiff in the city of Montgomery, to state the nature, character, and extent of the business." Also, "that if he has knowledge of the levy of the attachment on the goods, wares and merchandise of the said plaintiffs, about the first of January, 1845, to state the value of the goods at that time, and his means of knowing," &c. The remaining question requires him "to state fully and accurately the situation and business of the plaintiffs before and after the levy of the attachment, and if any damage resulted to the plaintiffs by reason of the levy within his knowledge up to the 15th of April, 1845, to state particularly how, and in what manner the injury accrued, its extent, and the witness's means of knowing," &c. Leading questions are such as suggest to the witness the answer desired. 1 Greenl. Ev. 506, § 434. Such is not the form of these, but they call the attention of the witness to the subject matter, and, limiting his inquiry within particular periods, very properly elicit his information concerning it. Every question may be said in some sense to be leading, and it would be impossible to lay down any exclusive peremptory rule on the subject. The due administration of justice requires that much discretion must be left to the court trying the cause, to be exercised in reference to the character of the investigation, the condition and disposition of the witness, and the peculiar circumstances

attending the examination. There must be a palpable violation of some established rule of law, to justify this court in interfering with the exercise of that discretion. *Blevins v. Pope & Son*, 7 Ala. Rep. 371; *Watson and Watson v. Anderson*, 11 Ala. Rep. 43; *Phil. Ev. C. & H.'s Notes*, 724-5.

Before proceeding to examine particularly the legality of the proof objected to, let us determine what are the legitimate sources of damage to the plaintiffs below, resulting from the act complained of. The statute which we have above quoted, entitles them "to recover *any* damage they may have sustained," but we must construe this to mean such damage as is the *natural and proximate* consequence of the *tortious* act. The cases relied upon by the elementary writers, as affording the best exposition of the rule, are *Ashley v. Harrison*, 1 Esp. Rep. 48, and *Vickars v. Wilcocks*, 8 East, 1. In the former case, the defendant had libelled a performer at a place of public entertainment, in consequence of which she refused to sing: Held, that the diminution of the receipts of the owner of the house, in consequence of such refusal, furnished no ground of damage. So, in the other case, where the plaintiff sued for words charging him with cutting his employer's cordage, in consequence of which his employer discharged him from his service. It appeared at the trial, that the term for which the plaintiff had been engaged, had not expired when he was discharged. *Lord Ellenborough, C. J.* said, "the special damage must be the *legal and natural* consequence of the words spoken, otherwise it did not sustain the declaration. There, the master's act was an illegal consequence, a mere wrongful act, for which defendant was no more responsible than if, in consequence of the words, other persons had assembled and seized the plaintiff and thrown him into a horse-pond, by way of punishment for his supposed transgression." *Sedgwick on Damages*, 74-5; 2 *Greenl. Ev.* 210, § 256; *Dryo v. Wagoner*, 19 *Johns. Rep.* 241; 2 *Starkie on Slander*, 64-5.

The action here is by a mercantile firm, composed of three individuals, for injury done to their joint business, in which they were engaged as partners. The injury complained of should not only be, the natural, proximate, legal result, or consequence of the wrongful act, as we have shown above,

but must affect the *joint* business, or trade of the partnership, and injury to the private feelings of the individual partners, is clearly not the proper subject of inquiry in this suit; such was the decision of the court in the case of Haythorn v. Lawson, 3 Car. & Pa. 190, and is sustained by the elementary writers. Coll. on Part. 402-3; Story on Par. 368, § 257; Carey on Par. 94. What *joint* injury should be considered as the natural and proximate consequence of wrongfully and maliciously suing out the attachment, upon the ground that the plaintiffs in the court below were about fraudulently disposing of their property, and the seizure and levy upon their goods? It is most obvious that no step could be more effectual, or better calculated to ruin the reputation of the firm, to prostrate its credit, and injure the joint business, than the act complained of. Was the estimation in which the firm was held in the community, as being honest and fair in its dealings, impaired? Was their joint credit injuriously affected? Was their business stopped, and their merchandize injured, and sales prevented? All these we regard as proper subjects of inquiry by the jury, and as constituting legitimate sources of damage. The counsel for the plaintiff in error insist, that much of the proof was of special damage, not warranted by the averments in the declaration. The distinction between general damages, or such as necessarily results, and as the law implies from the wrongful act complained of, and particular or special damage, being such as really took place, and are not implied by law, requires that the plaintiffs, if they seek a recovery for such particular injury, should notify the defendant, by appropriate special averments in their declaration, so that he may not be taken on surprise at the trial. 1 Chit. Pl. 195-6; Ib. 399. In the case at bar, the declaration is good without the averment of special damage, as the law implies nominal damages from the act complained of, but this does not authorize proof of special damage, and it is clear that no averment of particular damage, resulting from the loss of reputation, credit or business, or of the withdrawal of particular customers, is contained in it, so that all proof of such loss, if properly objected to, was improperly received in the court below. See forms averring special damage. 2 Chit. Pl. 641. *et seq.* See also,

Hartley v. Herring, 8 T. Rep. 131. In the latter case, Lord Kenyon, C. J., said, "where a plaintiff brings an action of slander, by which he lost his customers in trade, he ought in his declaration to state the names of those customers, in order that the defendant may be enabled to meet the charge, if false." Hunt v. Jones, Cro. Jac. 499; 1 Roll. Abr. 58; Deforest v. Leete, 16 Johns. 122, Platt, J.

Having ascertained what sources of damage constitute the proper subjects of inquiry, and the restrictions which must be imposed upon the admission of evidence of special damage by reason of the general averments in the declaration, we turn to the objections in the order proposed.

We are constrained to regard a portion of the proof which was allowed by the circuit court against the objection of the plaintiff in error, as mere matter of opinion, and without noticing the many exceptions taken to the proof upon this ground, we may sufficiently illustrate our view of the rule upon this subject by recurring to the testimony of one of the witnesses, who states, "that from his acquaintance with the business of the plaintiffs, the issuing and levying the attachment had the effect of destroying their credit and standing as merchants, and preventing them from carrying on their business, *and forcing them into an assignment.*" The general rule requires, that witnesses should depose only to *facts*, and such facts too as come within their knowledge. The expression of opinions, the belief of the witness, or deductions from the facts, however honestly made, are not proper evidence as coming from the witness; and when such deductions are made by the witness, the prerogative of the jury is invaded. It is their province to combine and compare the facts—to trace the connection between them—to deduce conclusions respecting them, and to form a correct judgment upon them. This general rule has an exception, extending to individuals whose knowledge and experience in some particular avocation in which they have been engaged, is presumed to be greater than that of ordinary men, and whose judgment and opinions upon matters coming within the scope of their particular employment, and with which they are familiar, are allowed to go to the jury. It is a mistake upon the one hand, that the assignment made by the plaintiffs be-

low, so soon after the issuance of the attachment, was but a consummation of their previous determination, and which determination caused the attachment to be issued. On the other, it is contended the assignment and consequent loss from a forced sale of the goods, &c., under it, were the effects of the attachment. Now this issue was a matter peculiarly coming within the province of the jury. The opinion of the witness, that the attachment forced the party to make the assignment, is substituted for the judgment of the jury. We say *opinion*, for it cannot in the nature of things, amount to a higher grade of testimony. There is no necessary connection between the attachment and the assignment. That the issuance of the one may have rendered the execution of the other practicable, may be very true, but that as a moral cause, it operated upon the minds of the defendants in error, so powerfully as to deprive them of their free agency, and force them to its execution, must be matter of opinion—a conclusion from the facts which the jury are presumed as competent to draw as the witness, and of which they are the exclusive judges. Such opinions do not fall within the exception to the general rule. See the authorities collected in 2 Phil. Ev. C. & H's Notes, 750, n. 529; *Lincoln v. The Saratoga and Schenectady Rail Road Company*, 23 Wend. 425, Nelson, C. J.; 1 Greenl. Ev. 515, § 440; *Andrews & Bros. v. Jones*, 10 Ala. 460, and cases there cited.

In *Herrick v. Lapham*, 10 Johns. Rep. 281, the court say, “to call upon witnesses to say whether a party has not sustained, or suffered a material injury by reason of the slander, is asking their opinion only, and putting them in the place of the jury, to draw conclusions from the facts proved in the cause.” Now in the case before us, many objections of a kindred character to the one we have above noticed, we regard as improperly overruled. One witness testified, “that even if the plaintiffs below had promptly paid up the debts for which the attachment issued, still, as it issued based on a charge of fraud, such charge would greatly injure and impair the credit of plaintiffs.” Another, “that the plaintiffs were *seriously damaged* by the issuance and levy of the attachment, both in character and business.” These, and the

like, are obviously the opinions of the witnesses, and should have been excluded.

The objections made to the depositions of merchants in the city of New York, at which place the plaintiffs below were in the habit of dealing, proving the basis of mercantile credit there, and the destruction of the credit of said plaintiffs, we think were properly overruled. These were facts proper for the jury, that they might ascertain the extent of the injury, and whether the foundation of their credit was not destroyed by the act complained of. But while it was proper, under the general averments in the declaration, to show as sources of injury the *general* loss of credit and mercantile character of the firm, it was not permissible to prove the loss of any *particular* customer. The proof made by the witness, Bates, "that on account of the upright, honest character of the members of the firm, and the business capacity of Mr. Jackson, he had trusted the firm, and would have continued to give them credit, until he heard they were accused of fraud," we think objectionable, as proof of particular injury resulting from what some third person stated to the witness. 2 Story on Slander, 64; Hartley v. Herring, 8 T. Rep. 130; Dickinson v. Boyle, 17 Pick. Rep. 78; Deforest v. Leete, 16 John. R. 122, 128.

Upon the same principle should have been extended the proof offered to be made by the deposition of the witness, Phillips, "that planters and others with whom the plaintiffs below had dealings in cotton, and who would have readily sold their crops to the plaintiffs on their individual credit, after they heard of the issuance of the attachment, would not sell them cotton," &c. If this was the opinion of the witness, we have seen it was inadmissible. If his knowledge, however, was derived from the persons who had withdrawn their credit from the firm, then the proof was but hearsay, and in either view, should have been excluded. The persons themselves are the best exponents of the motives and reasons which prompted them to trade, or withdraw their credit. See Johnson v. Robison and wife, 8 Porter's Rep. 486, 490.

The loss of the mercantile character and credit of the firm,

is a matter which may be proved by reputation, and such proof was properly allowed. By character, in this connection, we mean the generally received opinion in the community respecting the solvency of the firm—the probity and punctuality with which it discharged its obligations, and the efficiency with which its affairs are managed. Credit, which is usually the result of those qualities and capacities we have named, may be defined, the ability to borrow money or obtain goods in virtue of the opinion conceived by the lender, or seller, that the party will repay. The loss of this credit, whether it be based upon actual capital, or upon that which is justly esteemed by the witnesses, a surer guaranty of repayment, “honesty, integrity and business capacity,” may well, in this action, be compensated, and evidence showing the state of the public mind, in respect to the character and credit of the firm was unexceptionable. See *Lawson v. Orear*, 7 Ala. 784; *Massey v. Walker*, 10 Ib. 288.

The views we have expressed, embrace, we believe, all the points raised in the argument upon the record, and are also decisive of the questions made upon the charges refused, as well as those given by the court.

As we have seen that credit may exist aside from capital, based as it may be upon the integrity and business capacity of the firm, the court perhaps charged too favorably for the plaintiff in error, in making the right of defendants in error to recover for injury to their joint business, to depend upon the fact, whether, from the profits of the business they were engaged in, they could have extricated themselves from their insolvency. But this is not to the prejudice of the plaintiff in error.

It results too, from what we have said, that the court should have excluded the proof of the loss in the sales of the goods made under the deed of assignment. There is in the declaration no averment of this special loss, and if there were, we feel confident such loss, thus accruing, cannot be recovered in this action. It is not the proximate or natural con-

sequence of the attachment; and the plaintiffs may have caused it by the execution of the assignment, which required the goods to be sold. See 5 Wend. 538; 1 Esp. Rep. 48; 2 Stark. on Sl. 64, 65; 1 Smith's Leading Cases, 302-4, and authorities there cited.

For the errors we have noticed, the judgment of the circuit court is reversed, and the cause remanded.

RYAN v. THE STATE.

1. Where two judgments are rendered against a defaulting witness, for failing to attend as a witness, in a State cause, at different terms of the court, the proper remedy is, to move the court to vacate the last judgment, on producing the first, and upon the refusal of the court, a writ of error would lie to this court.

Writ of Error to the Circuit Court of Tuscaloosa. Before the Hon. G. D. Shortridge.

W. M. MURPHY, for the plaintiff in error, cited Clay's Dig. 599, § 3.

The ATTORNEY GENERAL for the State.

COLLIER, C. J.—The plaintiff in error was summoned as a witness at the instance of the State, to give evidence on the trial of an indictment against Alexander McMillian, which was pending in the circuit court. At the spring term of that court holden in 1844, a judgment *nisi* was rendered against the plaintiff, with some six or seven other persons, as defaulting witnesses, which, after the return of two *sci. fa's*, "not found," was made final. Afterwards, at the spring term of

1845, a similar judgment was rendered, which was made final in the same manner. The entire proceedings are stated in the transcript before us, and it is insisted that the second judgment was unauthorized, and should be reversed.

Looking at the last judgment as disconnected from the first, and there is nothing to show its irregularity. It must be conceded, that the proceedings, so far as form is concerned, are unobjectionable, and we think it is not allowable to refer to the first judgment, to show that the entire statute penalty had been recovered, so as to warrant a reversal of the last judgment. Admitting, that although the *subpœna* in a criminal case requires the witness to attend from term to term, there can be but one penalty recovered for the failure to obey its mandate, yet if two recoveries are had, the witness's remedy to avoid the second, is not by writ of error. He should move the primary court to vacate the judgment upon producing the first, and if unauthorized, it would be competent to do so, just as that court would annul the last judgment, where one had been previously rendered decisive of a suit; or as this court would do where a judgment was affirmed on certificate, and afterwards reversed upon errors assigned; but in the latter case, the last judgment would stand as the definitive sentence, and the first be vacated. This course of proceeding harmonizes with legal analogies. If the court should deny the motion, it would be allowable for the party to except, and then present the question now sought to be raised, for revision. But the case as presented, cannot be entertained, and the writ of error is consequently dismissed.

POWELL v. THE GOVERNOR, use, &c.

1. An assignment of a breach, in a suit on a sheriff's bond, that lands of the defendant in execution, worth \$5,000, were unlawfully, and negligently sold by him, for \$303, to satisfy an execution of the plaintiff for \$234, besides costs, is bad on demurrer, there being no allegation, that the sale was made on other executions than that of the plaintiff, or that the money was absorbed by senior executions.
2. When a sale is fairly conducted by the sheriff, mere inadequacy of price is not sufficient to subject him to damages. To render him liable, there must be either fraud, or gross neglect, in the performance of his duty, causing injury to the plaintiff, or defendant in execution. Whether a sale at a grossly inadequate price might not, with other circumstances, be evidence of fraud, *quere*.

Error to the Circuit Court of Coosa. Before the Hon. J. D. Phelan.

DEBT by the defendant in error, against the plaintiffs in error, sureties of William J. Campbell, sheriff of Coosa county, on his official bond.

Several breaches were assigned, the third of which only need be noticed. It recites, that the sheriff received an execution, which issued in favor of George Patterson, for whose use the suit is brought, against Starke Hobday, for \$234, besides costs, returnable to the fourth Monday of March, 1842. That the sheriff levied the execution on real estate of Hobday, of the value of \$4,000, and on the first Monday of March, 1842, unlawfully, and illegally, and contrary to his duty as sheriff, sold said land, for a grossly inadequate price, to wit, for \$303, when in truth said lands were worth \$5,000.

The court overruled a demurrer to this, and other breaches which were assigned, and issue was taken. Upon the trial, it appeared that the sheriff levied the execution on nine hundred and eighty acres of land, as the property of Hobday. That the land was incumbered by a mortgage to the amount of \$800 or \$900. That the land was sold at a time, when

the creeks were high, and that but four persons attended the sale. The land was sold for \$303, on a *venditioni exponas*, issued on another execution. It was proved to be worth from \$3,500 to \$4,000, and that it might be expected to bring one half its value at sheriff's sale; but there was a difference in the estimates of the witnesses, some valuing it at \$3 50, and others at \$1 25 per acre.

It was also proved, that the sheriff had other executions in his hands at the time, to the amount of \$1,078, all of which were levied on the land, and that he paid the money arising from the sale of the land, to older *liens* than that of the plaintiff's execution. That he subsequently levied on personal property of Hobday, sufficient to discharge all the executions in his hands, and took a forthcoming bond for its delivery. That before the time for the delivery, the sheriff died, and there was no one to receive the property on the day appointed for its delivery, though it was then produced.

Many charges were given, and refused. The substance of the charges given, is, that if the sheriff sold the land for a grossly inadequate price, he would be responsible to the plaintiff, and that the measure of damages, was the amount due on the execution, if the land should have sold at sheriff's sale for a sum sufficient to pay and satisfy the execution. Further, that if the land should have sold for \$4,000, or even \$2,500 in cash, and it was sold, on a day when the waters were high, and but four bidders present, for \$303, that this was a grossly inadequate price, and they must find for the plaintiff.

The defendants excepted to these charges, and to the refusal to charge the converse of these propositions, and now assign these matters, together with the decision of the court on the demurrer to the third breach, for error.

PARSONS and YANCEY, for plaintiff in error.

1. The land was sold under a *venditioni exponas*, which commands the sheriff to sell "at all events, for the best price he can get." Bac. Ab. tit. Sheriff, N. 6; Viner's Ab. tit. Sheriff, E. I.; Cowper, 405; Lyon v. Ide, N. Chipman's R. 49; 1 D. Chipman's R. 46; 3 Wash. C. C. R. 546.

2. The first charge asked by the defendants, should have

been given—1. Because it meets the case presented by plaintiff in all the breaches. In the first, in which nothing is presented. In the second, because the plaintiff averred that the sheriff did not levy and satisfy said *fi. fa.* when Hobday had sufficient property in the county, and this is fully met in the charge asked, to wit, that the sheriff did levy said *fi. fa.* on property sufficient to bring enough at sheriff's sale, unincumbered by a mortgage, to satisfy the debt, and finding it did not do so, that he on the same day made another levy upon sufficient property to satisfy said debt, and did not sell, because death removed him from the scene, before the sale day.

3. The first charge given by the court, leaves the question of gross inadequacy of price to the jury, to be determined by them. This was a matter of law, to be determined by the court when the facts had been ascertained. *Houser & Wilson v. Hampton*, 7 Iredell, 336.

W. W. MORRIS, for the defendant.

1. The breaches assigned in the declaration are good; the demurrers were properly overruled. *Gov. use, &c. v. White*, et al. 4 S. & P. 441, and cases there cited.

2. The demurrer to the third breach raises the question as to the right of the sheriff to sell property in the manner shown, for a grossly inadequate price, to the damage of plaintiff in execution—this is a good breach. The second and third charges correct under the proof. *Gov. use, &c. v. Powell*, 9 Ala. 36; *Keithly v. Birch*, 3 Camp. 521; *Phillips v. Bacon*, 9 East. 303; *Barrard v. Lee*, 1 Stark. 287; *Rex v. Bird*, 2 Shower, 87; *Watson on Sheriff*, 7 vol. Law Lib. 134.

3. The first charge presents quite a different question to that settled in *Gov. use, &c. v. Powell*, 9 Ala. 36. On that trial, the bill of exceptions did not show that the land levied on was incumbered by a mortgage. The principle supposed to be settled in that case should rather be restrained than extended. *Hallett v. Lee*, 3 Ala. 28, decides, that if a sheriff delays sale too late to make the money on a forfeited bond, he is liable—that opinion is adhered to in *Gov. use, &c., v. Powell*, 9 Ala. 87. There is no difference in principle be-

tween a levy too late to make the money, and an early levy, and a sale not in time to satisfy the *fi. fa.* If it is a question of intention, why not have permitted the sheriff to have shown, that he had reason to suppose that the bond would not have been forfeited.

4. On the failure, under the facts, to make the money on plaintiff's *fi. fa.* by the date of its return, the liability of the sheriff became fixed, which nothing short of a release can remove. It is no answer to say, that the sale could have been set aside on motion. *Levitt v. Smith, et al.* 7 Ala. 182.

5. A deed duly recorded is notice to the world. There is no reason for an exception in favor of sheriffs. 1 Story's Eq. § 403; *Toulman v. Austin*, 5 S. & P. 410; 1 Story's Eq. § 409. Not to charge the sheriff with notice would defeat the mortgage.

DARGAN, J.—The only question we shall notice arising out of the state of the pleading is, the demurrer to the last assignment of the breach of the condition of the bond. This assignment alledges, that an execution issued in favor of George Patterson, (for whose use the suit is brought,) for \$234, besides costs, and was levied on the real estate of the defendant in the execution, Hobday, of the value of \$4,000, and that the sheriff unlawfully, negligently, and contrary to his duty as sheriff, sold said real estate at a grossly inadequate price, to wit, for the sum of three hundred and three dollars, when, in truth, said lands were worth \$5,000; wherefore said plaintiff says he is damaged to the amount of his execution.

It is alledged that the plaintiffs execution was for the sum of \$234, besides costs, which amount only to some eight or ten dollars; and also, that the land at the sale brought \$303, which is sufficient to pay the execution, and all costs. We cannot see upon what principle the plaintiff can charge the sheriff, for selling the goods of the defendant in execution for a grossly inadequate price, if the sum raised at the sale, is sufficient to satisfy his debt. The receipt of the money by the sheriff, is a satisfaction of his execution, and if his debt is satisfied, he cannot alledge that he has received any injury from the manner in which the sale was conducted.

The demurrer to the last breach should have been sustained. If the sale took place under several executions, and some older than the execution of the plaintiff, which absorbed the whole amount for which the land was sold, this ought to have been averred, but if not averred, it cannot be intended.

The other question we propose to examine, grows out of the bill of exceptions, and is one of novelty and great importance. It is, whether the sheriff is liable in damages to the plaintiff, for selling the land of the defendant in execution, for a grossly inadequate price. This question came before this court in the case of *The Governor v. Powell*, 9 Ala. 85, but was not decided. And in the case of *Powell v. The Governor*, 9 Ala. 36, the question, although adverted to, did not directly arise; and therefore the question may be considered as *res integra* in this court.

It is the duty of a sheriff to obey the mandate of the writ, and to execute it in good faith, and if he act honestly, in the discharge of his duty, and in obedience to law, he should be protected by law. If, however, he act dishonestly, or fraudulently in the execution of process, he must be answerable to those who have been injured by such acts. And if he is guilty of gross negligence in the execution of a *fi. fa.*, from which injury has resulted, he ought not to be protected from the consequences of such gross neglect, because he is acting under the mandate of a judicial process. In the case of *Lynch v. The Commonwealth*, 6 Watts' Rep. 495, a question very similar to the one now before the court arose. In that case, the sheriff had in his hands *fi. fa.*'s, and also writs of *venditioni exponas*. He had sold the goods of the defendants, and it was contended at a grossly inadequate price. The court say, that in the absence of any directions by the plaintiff in the execution, the sheriff pursues the exigency of the writ—he sells at public auction, and if he is not guilty of fraud, or neglect in relation to the sale, he is not answerable to the plaintiff, although the goods bring an inadequate price. That gross inadequacy of price, may be evidence of fraud, or neglect in the discharge of his duty, but within itself does not give the plaintiff a right of action. How far he might be authorized to postpone a sale, from a regard to the defendant's interest, is another question; but it is clear

that unless he has been guilty of fraud or neglect, he is not answerable to the plaintiff for proceeding merely to sell the goods, as required by the writ, although they bring an inadequate price.

So far as I have been able to examine the English authorities, they do not recognize a different rule. In 1 Starkie's Rep. 43, it is held, that if the sale be fair, the sheriff is not liable to an action, though the property be sold for much below its real value; and I conceive this to be the true principle. It is true, that in 3 Campbell, 521, Lord Ellenborough said, if the goods were really worth £300 or £400, he thought the sheriff would be liable for selling them for £72. But it may be asked why he thought so? Would he have so held, if the proof had fully shown that the sale was fair and *bona fide*, and that the sheriff could not get more. Or did he think so, because the goods were of such a character that they would probably meet with a ready sale, and the price being so grossly inadequate, that it superinduced on his mind the idea of fraud; or that there had been some dishonesty in the sale? If the latter were the ground of his opinion, then there is no conflict between the cases in 3 Campbell and 1 Starkie. But we think the principle declared in 6 Watts is the correct exposition of the law. That before the plaintiff in execution can charge the sheriff in damages for a sale of property, he must show that there has been either fraud or gross negligence in the sale. This principle seems to us peculiarly applicable in reference to real estate. How is the sheriff to know the character of the defendant's title, even if he could ascertain the incumbrances on it by way of mortgage? And when we see the difference in the estimates of value placed on the land sold in this case, by those who live near it, and know it well, we see the difficulty that would result from the rule, holding the sheriff liable for the sale of land, for an inadequate price merely. Whilst, therefore, mere inadequacy of price, when the sale is fairly made, will not subject the sheriff to damages, yet if there was fraud in the sale, or gross neglect, accompanied with injury to the plaintiff in execution, or to the defendant, the sheriff could not shield himself from the consequences result-

ing from such fraud, or neglect, by showing he was guilty of it, in the execution of legal process.

The charge given by the court, at the request of the defendant in error, is erroneous, as it contravenes the view here taken, and proceeds upon the idea, that inadequacy of price, within itself, is sufficient to charge the sheriff with damages, at the suit of the plaintiff in the execution.

Let the judgment be reversed, and the cause remanded.

WHITAKER v. SANFORD, ET AL.

1. It is error to dismiss a cause because security has not been given for the costs, pursuant to an order of the court, if the party is able, and willing to give the security, when the cause is called for trial.

Error to the Circuit Court of Autauga. Before the Hon. J. D. Phelan.

MOTION by the defendant at the spring term, 1847, requiring the plaintiff, who was proved to be a non-resident of this State, to give security for the cost, which motion, upon sufficient showing to the circuit court was granted, and it was ordered by the court, at said term, that unless the plaintiff gave security in sixty days from the time of making the order, the said cause was to stand dismissed. At the next succeeding term, security for the cost not having been given, on motion of the defendant, the cause was dismissed by the court.

It appears from a bill of exceptions, that before the dismissal of the cause, and when it was called for trial, the plaintiff offered to give security for the cost. The court re-

fused him permission to do so, but dismissed the cause, for the reason that the security had not been given within the time prescribed by the order.

The refusal of the court to permit the security to be given, and the judgment dismissing the cause, are assigned for error.

BELSER and HARRIS, for plaintiff in error.

CHILTON, J.—Several decisions have been made by this court, construing the statute upon which this motion is predicated. Dig. 316, § 26. In *Lyons v. Long*, 6 Ala. Rep. 103, it was held, that the object of the legislature in requiring security for cost to be given in sixty days, was to prevent surprise at the trial, and that it was allowable to give security *any time at or before the trial*. That if the defendant was taken by surprise, by the plaintiff's giving the security, when the cause was called for trial, the court, upon being certified of the fact, would prevent any prejudice to him by giving him a continuance of the cause. The same point came again before this court in *Reese v. Billing*, 9 Ala. Rep. 263, where it is held, that an order made at a previous term of the circuit court, setting aside a non-suit, upon condition that the plaintiff should give security for the cost, "by the next term of the court, on the cause dismissed," &c. should be so construed as to permit the party to give the security at the call of the cause for trial.

These cases, which we regard as properly expounding the statute, are decisive of this case.

Let the judgment be reversed, and the cause remanded.

BRASHER AND GOOCH, ADM'RS, V. LYLE AND HOUSE.

1. An affidavit made to an account, filed against an insolvent estate, does not establish its correctness; but if required, the creditor must prove it by competent testimony.

Writ of Error to the Orphans' Court of Shelby. Before his honor W. G. Bowdon.

THE defendants in error filed several claims against the estate of the plaintiffs' intestate, which had been declared insolvent, one of which was an open account for \$45 22. To the allowance of these claims, the administrators objected in writing—1. Because they were not due to the pretended creditors, and have been fully paid. 2. Because they were not verified by the affidavit of the creditors, and filed with the clerk within six months after the estate was declared insolvent. An issue being made up as directed by the statute, and tried by the court without the aid of a jury, it was adjudged that the claims be allowed, and that the administrators pay the costs. It is shown by a bill of exceptions, that an affidavit filed after the claims were objected to, and which was made by one of the creditors, was admitted as evidence, or if not, that the account was allowed without any evidence to support it—the judge being of opinion that the objections did not require the creditors to make any proof, and that the affidavit was a sufficient compliance with the statute.

POPE, for the plaintiffs in error, cited Clay's Dig. 194, § 10 and 11; 342, § 161.

L. E. PARSONS, for the defendants in error, cited 8 Ala. Rep. 454; 10 Id. 520, 565.

COLLIER, C. J.—The act of 1843, to "amend the laws now in force in relation to insolvent estates," requires that

claims shall be filed against insolvent estates, in the clerk's office of the orphans' court, within six months after the same is declared insolvent; and that such claim shall be verified by the affidavit of the claimant: *Further*, within nine months after an estate is declared insolvent, the administrator or any creditor may object to any claim filed against the estate—an issue shall be made up and tried, and the unsuccessful party shall pay all costs. Clay's Dig. 194, § 10, 11. Under this statute, it has been held that it is not necessary an affidavit should be made at the time the claim is filed; that the administrator or creditors have the right to the oath of the claimant to the justice of the claim; and if an exception is taken for the want of an affidavit, the affidavit may be supplied any time before the estate is set for final settlement by the statute. 10 Ala. Rep. 520, 564.

The affidavit required, is not intended to establish a disputed account, but to prevent a simulated or satisfied claim from being set up against the estate to the prejudice of *bona fide* creditors. And no matter what may be its apparent dignity, the justice of the claim must be verified—even if it be evidenced by a promissory note or a judgment.

The objections to the claims were sufficiently broad to throw upon the creditor the *onus* of making out the correctness of his account as a charge upon the intestate's estate. This could not be done by the evidence of the parties interested, as the account was for a larger amount than they could establish by their own oath, and is expressly excepted from the influence of the act of 1839, which under certain circumstances admits the oath of the plaintiff, where a suit is commenced upon an account not exceeding \$100. Clay's Dig. 342, § 161. The affidavit, then, should have been received as a mere compliance with the act of 1843, and not to establish the account. In giving to it such an effect, the orphans' court erred—its judgment is consequently reversed, and the cause remanded.

DEAN AND JOHNSON v. THE GOVERNOR, &c.

1. No suit can be maintained against a sheriff on his official bond, for money received by him on an execution after the return day is past, though he would be individually liable for the money so received.
2. An assignment of a breach, which shows, that the money was received by the sheriff at a time subsequent to the return term of the writ, as ascertained by law, is bad on demurrer.

Error to the Circuit Court of Conecuh. Before the Hon E. Pickens.

THIS is an action of debt against the defendants, on a bond executed by Dean as principal, and Johnson as his security, conditioned that Dean should well and truly perform all the duties of sheriff of Conecuh county, and pay over all monies that might come into his hands, as such sheriff. The first assignment of the breach of the condition of the bond is, that Dean did not well and truly perform all the duties of sheriff of Conecuh county.

The second assignment is, that a *venditioni exponas* issued from the circuit court of Conecuh, in favor of the parties for whose use this suit is brought, against Thos. Salmond, which writ was dated the 12th of December, 1844, and was returnable to the spring term of said court, 1845, and by virtue of which writ, the said Dean did, on the 12th day of June, 1845, receive of the defendant, a large sum of money, to wit, the sum of \$15,000, which he has failed to pay over to the plaintiff, although the same was, on the day last aforesaid demanded of him.

There was a demurrer to each assignment of breaches, but the demurrer was overruled.

A trial was then had, and a bill of exceptions was sealed by the judge, which shows, that an execution in favor of the parties for whose use this suit was brought, against T

Salmond, was issued in April, 1844, returnable to the fall term of the circuit court, and the same came to the hands of, and was by Dean, as sheriff, levied on lands and other property of the defendant. The execution was then staid by the plaintiff, until the 3d of March, 1845; again stayed until the 15th May, 1845; and was again further stayed until the first Monday in June. On the 3d of February, the sheriff received \$500 from the sale of property under said execution, and paid it over to the plaintiff, except \$25 retained for cost and commissions, and on the 2d of June, 1845, he sold the land levied on, for \$891. The slaves levied on, after the levy, were carried to South Carolina, to be sold, by agreement, and the proceeds to be applied to the payment of this and other debts. It was further in proof, that before the land was sold, the plaintiff and one Whitaker agreed, that the latter should buy the land at sheriff's sale, and that Whitaker should pay \$4,000 on the debt, without regard to the amount he might bid at the sale. Accordingly he bought the land at the sale for \$890. The sheriff did not know of this arrangement. It also appeared, that a *venditioni exponas* was issued on the 12th December, 1845, returnable to the spring term, 1845, of the circuit court, and was in the hands of the sheriff. That Whitaker has paid the \$4,000 to the plaintiff in execution. That the defendant, Dean, retained out of the sum paid him on the sale, half commissions on the whole debt.

The defendants requested the court to charge the jury, that if they found that the money was paid to the sheriff after the return day of the writ, that the plaintiff could not recover in this form of action; which was refused. Also, that if the plaintiff received \$4,000 in the manner stated, that the sheriff was entitled to commissions on that amount; which the court refused, and the plaintiff excepted.

The errors assigned are—That the court erred in overruling the demurrer to the breaches assigned.

2. That the court erred in not giving the charges as requested.

WATTS, for plaintiff in error.

DARGAN, J.—If it can be said, that there are two distinct assignments of breaches of the condition of the bond, it is very clear, that the first assignment is bad. It is merely, that the said Dean, as sheriff, did not well and truly perform all the duties of sheriff. This breach is entirely too general. Where a sheriff's bond is put in suit, for the use of any individual, he must show in the assignment of the breaches, some act of the sheriff, or some omission to do a duty, injurious to the party for whose use the suit is brought. But we are rather disposed to think, that the pleader intended one breach, and commenced the assignment with the general averment of a failure to perform all the duties of sheriff, and then proceeded to state the particular act which constituted the breach, and we will therefore treat the declaration as containing one assignment of breach of the condition.

It is alledged, that on the 12th December, 1844, a writ of *venditioni exponas* issued, in favor of the plaintiffs, for whose use this suit is brought, against Thomas Salmond, returnable to the spring term of the circuit court of Conecuh, and that on the 12th day of June, 1845, the defendant Dean, as sheriff, received by virtue of said writ, a large sum of money, to wit, \$15,000, which he has failed, and refused to pay over, after demand made for the same of him by the plaintiffs.

We are bound to take notice of the time when the circuit courts sit, and consequently to know, that the spring term of the circuit court of Conecuh county, is held on the fourth Monday of March. The declaration therefore shows that the money was received by the sheriff after the return day of the process by which he was commanded to make it, and which gave him authority to receive it.

It is settled, that if money be paid to the sheriff, after the return day of the writ, that no suit can be sustained against his securities for his failure to pay it over, nor does such a payment amount to satisfaction of the judgment. 2 Stew. & Porter, 109; 3 Ib. 385; 1 Stew. 72; 4 Randolph, 336. Such payments, therefore, cannot be said to be made to him as sheriff, nor will the failure to pay over the money, constitute a breach of the condition of his bond. The facts, then, as alledged, not amounting to a breach of the condition of the bond, the demurrer should have been sustained.

The facts presented by the bill of exceptions, show that the money was received by the sheriff after the return day of the process, and consequently the court erred in refusing to give the charge first requested by the defendants, which was, that if the jury should find that the sheriff received the money after the return day of the process, that then they should find for the defendant.

Although it is very clear that the sheriff, as an individual, would be liable in an action for money had and received, if he received the amount of an execution after the return day thereof, yet as he had no right to receive it as sheriff, (and as such a payment will not operate as a satisfaction of the judgment,) he cannot be sued on his bond for a failure to pay it to the plaintiff, because it does not constitute a breach of the bond.

We do not think it necessary to advert to the question of the commissions that the sheriff was entitled to retain, under the circumstances, for the view we take of the law will be decisive of this cause, unless the plaintiff can show, that the process in the hands of the sheriff at the time of the payment, gave him the right as sheriff, to demand and receive payment. The judgment is therefore reversed, and the cause remanded.

CARTER v. HINKLE.

1. The orphans' court has no power to authorize an executor to sell the dead victuals and liquors, laid in by the deceased for consumption in the family, and left at his death, or the property exempt by law from sale; and the widow may, notwithstanding such order, maintain trespass against the executor. The removal of a part of the children from the family, will not prevent the widow from recovering her share of the dead victuals.

Error to the Circuit Court of Lowndes. Before the Hon. E. Pickens.

TROVER by plaintiff in error, against the defendant in error, to recover various articles of property, named in the statute of this state, as exempt from sale, by an administrator of intestate's estate, or executors, and reserved for the use of the family. The defendant pleaded—1. Not guilty. 2. That the subject matter of this suit had been adjudicated, in the orphans' court of Lowndes. The plaintiff took issue on the first plea, and demurred to the second.

From a bill of exceptions it appears, that the plaintiff is the widow of one Stith M. Carter, who, before the commencement of this suit, departed this life, having by will appointed the defendant his executor. That at the time of said Carter's death, he left four children by a former marriage, the plaintiff, his widow, having been delivered of a posthumous child, with which she was *enciente* at the time of his decease. That shortly after the testator's death, and before the birth of the posthumous issue, the four children left the late residence of testator, where his said widow continued to reside, and went to live with a person who had been appointed their guardian. That the widow alone, of all the white family, continued to reside at the late residence of her husband. The plaintiff, as widow, being possessed of the dead victuals left at the time of testator's death, and the property exempt by law from sale, the defendant, after the removal of the four children, was proceeding to take possession of said property, for the purpose of making a division of it between the children and the plaintiff, when, to prevent this, the plaintiff petitioned the orphans' court of Lowndes, to restrain the said defendant, as executor, from interfering with it, and to cause it to be set apart for the use of the family, as exempt from sale. Thereupon, the executor being cited, appeared before the court, and an order was passed by the judge of the orphans' court, restraining the defendant from selling the dead victuals, and liquors, laid in for consumption by testator, and left at his death, and ordering the said executor to divide the same among the children and the plaintiff. As to the property exempt from execution, and which is required to be reserved from sale for the use of the family, the court

was of opinion, that as the children had left the widow, this property should be sold at public auction by the executor, for the purpose of making a division and apportionment of it. The executor was required to hold the proceeds, and to make a separate return of the sales to the court, and that after the birth of the child, with which the said plaintiff was *enciente*, he should divide the funds among the widow and all the children of the testator, share and share alike. The defendant, as executor, proceeded to divide the provisions on hand at the testator's death, and sold the property exempt from execution, in obedience to the said order of the orphans' court.

Upon this evidence, the circuit court charged the jury, that the plaintiff could not recover in this action, and refused to charge them as requested by the plaintiff's counsel, that the proceedings in the orphans' court was no bar to her recovery, but, on the contrary charged, that the proceedings above shown in the said orphans' court, was a bar to the action. The counsel for the plaintiff excepted to the charges given by the circuit court, as well as to the charge refused, and assigns the same in this court for error.

WATTS, for plaintiff in error.

1. The wife was the head of the family, after the death of the husband, and was the guardian by nature of the children, and therefore had a right to sue. See *Capel's Heirs v. McMillan*, 8 Por. 197.

2. The wife is a part of the family, and if the husband had died leaving no children, still the wife would have been entitled to the property sued for. See statute, Clay's Dig. 196, § 20, 21.

3. The orphans' court had no authority to command the administrator to do an illegal act, and if he acted under it, he did so at his peril.

4. The orphans' court had no jurisdiction of the matter it attempted to adjudicate, and if it appeared that the plaintiff consented thereto, that consent would not give jurisdiction. See *Wyatt, et al. v. Judge*, 7 Por. 37. But it does not appear that she consented to such jurisdiction.

5. The orphans' court had no authority to restrain the administrator from selling, &c., as petitioned for by the plaintiff in this suit. But the court did not act in accordance with the petition.

6. The voluntary act of the children in leaving the residence of the mother, could not deprive her of the benefit of the statute. There was still the infant child, left with her, which was born *after* the death of the husband. The fact that the child was born after the death of the husband, could not alter the rights of the wife. See *Watson v. Simpson*, 5 Ala. 233.

JUDGE, for the defendant.

1. The family, and not the widow alone, is entitled to the dead victuals and liquors on hand, at the time of the death of the testator or intestate; also, to such property as is by law exempt from execution. And if any child leaves the family before the final consumption thereof, such child has the right to carry away an equal portion of the same. *Clay's Dig.* 196, § 20, 21.

2. The children that left the family of the deceased Carter, were by a former marriage—the widow was not bound to support them—it was right that they should go to reside with the regular guardian, and they had the right to take with them their portion of the dead victuals, &c. Plaintiff in error, therefore, suffered no wrong or injury in the act of the executor, (defendant in error,) in dividing the dead victuals, &c. pursuant to law, although the executor may not have had the right strictly so to do.

3. But the orphans' court properly entertained jurisdiction of the matter, and exercised it at the instance of plaintiff, she having instituted the proceedings in said court; if otherwise however, she can have no right of action, she having received the full proportion to which she was entitled by law of the dead victuals, &c. She could have recovered no more if she had had a right of action. *Clay's Dig.* 196, § 20.

CHILTON, J.—By the act of 1826, (*Dig.* 196, § 20,) it is provided, that “the dead victuals, and liquors which, at the

death of any testator, or intestate, shall have been laid in for consumption in his family, shall not be sold by the executor, or administrator, but shall remain for the use of said family, without any account thereof being made. If, however, before their final consumption, any child shall leave the family, such child shall have a right to carry with him, or her, an equal share of what shall then be on hand." It was further enacted, by a statute of the succeeding year, (Dig. 196, § 21,) "that all such property as now is, or hereafter may be exempt from execution, is hereby exempt from sale by an executor, or administrator, and the family shall be suffered to retain the same."

The object of the legislature, in the enactment of the above statutes, doubtless was, to provide the family of the deceased with the present means of subsistence, and comfort, by allowing them to retain, free from account on the part of the executor, or administrator, such articles as were indispensable for their maintenance and convenience. The executor being, by the express terms of the statute, prohibited from selling, as well as relieved from accounting for such property; and the statute conferring no authority upon the orphans' court to order a sale in any event, it follows as a necessary consequence, that the proceedings in the orphans' court were *coram non judice*, and void, and that the executor derived no power over the property, by virtue of the order requiring him to sell it.

The powers of the orphans' court over the estates of deceased persons, are limited. It can only act in cases where legislative grant confers jurisdiction. *Leavens v. Butler and wife*, 8 Porter, 381. The decrees of that court, beyond the warrant conferred by statute, are nugatory, and *a fortiori* is the decree void, when it commands the executor to perform what the statute expressly prohibits him from doing. But it is insisted, as the widow instituted the proceedings, she should not complain, that the court entertained jurisdiction. Were this position correct, it would not sustain the decree. The petition was, to restrain the executor from doing what the court in effect orders him to do. But it is held by this court in the case of *Wyatt, et al. v. Judge, et al.* 7 Porter's

Rep. 37, that a want of jurisdiction of the subject matter, is not aided by plea to the merits, and is available in the appellate court; and that the consent of parties, whether express, or implied, cannot confer jurisdiction—such is the general rule.

It is further contended, by the counsel for defendant, that the *family*, and not the widow, is entitled to the property sued for. It is true, should the children, after the death of the father, leave the family, the statute provides they shall have a right to carry with them an equal share of the property reserved by the act of 1826, but this provision does not extend to the property exempted from sale by the act of 1827. The widow, upon the death of her husband, becomes the head, and representative of the family. *Heirs of Capal v. McMillan*, adm'r, 8 Por. Rep. 197. And consequently entitled to sue for property, which she has in possession, and is allowed to retain for the use of the family. Nor is this capacity to sue taken away by the removal of the children. We should do manifest violence to the intention of the legislature to hold, that the removal of the children should entitle the executor to seize and sell from the widow, such articles as the law esteems indispensable to her subsistence and comfort. Our conclusion is, that the executor should be considered as having acted without authority, and that the plaintiff, upon the facts stated in the bill of exceptions, is entitled to recover the value of her share in the dead victuals, &c., secured by the act of 1826, and the entire value of the other property, not included in the above recited act. The judgment of the circuit court is therefore reversed, and the cause remanded, that the court below may proceed to try the same according to the conclusions above ascertained.

ELLIOTT, ET AL. V. BOAZ, ET AL.

1. When a contract for the sale of land is rescinded by the decree of a court of chancery, the surety of the vendee is not responsible for the value of the use and occupation of the land by the vendee, the surety never having been in possession, or derived any benefit from it.

Writ of Error to the Court of Chancery sitting in Talladega. Before the Hon. W. W. Mason, Chancellor.

THIS cause was here at a previous term, and the decree which had been rendered was affirmed. 9 Ala. Rep. 772. The bill was filed by the defendants in error, and alleges that Elliott, as the agent of his co-defendant Huey, had sold to the complainant Boaz a certain tract of land, the location and boundaries of which he misrepresented, in consequence of which the latter became the purchaser of lands of inferior quality, and which he did not intend to buy. The co-plaintiff Davis joined with Boaz in making two notes for the purchase money, and received a conveyance to himself individually. An action was brought on the notes, which the bill prayed might be enjoined, the contract cancelled, the notes and deed delivered up, and the title re-vested in Huey. A decree was rendered granting the relief prayed, and directing a reference to the register to inquire and report what has been the value of the occupancy of the land by Boaz, and of any permanent improvements he has made or erected; that the one be set off against the other, the balance reported, and to whom due. This decree was affirmed by the decision referred to, and upon the reference to the register, he reported the value of the occupancy by Boaz, after deducting for improvements, to be \$160 02, and was of opinion that the same should be paid by Boaz to Huey. The defendants excepted to the report, because Davis was not charged with his co-plaintiff for the use and occupation; but the exception was overruled, and a final decree rendered according to the report.

L. E. PARSONS and S. F. RICE, for the plaintiff in error, cited 9 Ala. Rep. 42.

J. T. MORGAN, for the defendant in error, cited 5 Ala. Rep. 388.

COLLIER, C. J.—The only question presented for our decision, is, whether Davis is properly chargeable for the use and occupation of the lands in question. It must be observed that he does not appear to have been concerned in the purchase, or that he ever derived any benefit from the possession. The record exhibits him as a mere accessorial party, uniting with his co-plaintiff, the vendee, in the notes for the purchase money, and taking a conveyance to himself, doubtless for his own indemnity against the consequences of the liability he thus incurred. Davis's contract was to pay the purchase money, and from this he was relieved by the sale being annulled; the decree vacated the deed and destroyed the obligation of the notes; consequently, no further duty rested on him growing out of his contract. Upon what ground, then, shall he be charged for the occupation of the land by his principal, the vendee? The sale was declared void, without requiring the value of Boaz's possession to be paid as a condition precedent—this is merely a consequential requisition, and intended to make the vendee do justice to his vendor, who does not appear to have been in fault, though his agent was.

There is, then, no subsisting contract, which will bind Davis to pay for the use and occupation of his co-plaintiff, and we can discover no such obligation upon him founded in moral justice. But if there was a mere moral duty, it could not be enforced—he would have the right to stand on his contract, and insist that the measure of his liability should be thus graduated. We can discover no error in the decree of the chancellor, and it is therefore affirmed.

COLE v. SPANN.

1. All previous conversations or verbal agreements are merged in a written contract subsequently made; and when there was testimony of a written contract, it was error in the court to instruct the jury that the plaintiff might prove a fact by the contract in writing, or *otherwise*.
2. It is error for the court to refuse to give a proper charge, in the language requested.

Writ of Error to the Circuit Court of Macon. Before the Hon. S. Chapman.

THE defendant in error, declared in assumpsit, against the plaintiff in error, for money had and received; and upon a special contract. On the trial, a bill of exceptions was sealed by the presiding judge, which shows, that the plaintiff below introduced a witness, who proved a verbal agreement between the plaintiff, and defendant, by which the defendant below, agreed to purchase a tract of land of one Williams, containing three hundred and twenty acres, and to let the plaintiff have it at the same price he had to give Williams, provided that the land did not exceed eight dollars per acre. There was also testimony tending to show, that Cole had purchased the land for \$2,200 of Williams, but represented to Spann he had paid \$2,560 for it; and that Spann had paid him the last named sum for it.

The plaintiff in error then introduced a witness, who stated, that after the making of said verbal agreement, the parties met at one Dill's by appointment, and their contract was then reduced to writing, and that after the contract had been performed, as it was supposed satisfactorily to both parties, the same was destroyed by the direction of both parties. Another witness stated, that he had heard the contract read to the parties, and that they expressed themselves satisfied with it. That the stipulations of the written contract were

according to his recollection—that if the defendant Cole, could buy the land of Williams, that he was to let the plaintiff Spann have it, for eight dollars per *acre*, and that he had no recollection of any stipulation in said contract, by which the defendant was to let the plaintiff have it at the same price, that he might buy it of *Williams*.

The defendant requested the court to charge the jury, that if they believed, that the contract was reduced to writing, that the parol, or verbal contract, was merged in the written contract, and that the latter was the only contract between the parties. This charge the court gave.

2. That if the jury believed, that the contract was reduced to writing, then it was incumbent on the plaintiff to show, that the written contract contained a provision, that the defendant was to let the plaintiff have the land at the same price that he had to give Williams for it, and that unless the plaintiff had done so, he could not recover. This charge the court refused, except with this qualification, that to enable the plaintiff to recover, he must prove, that there was a contract in writing, or otherwise, that the defendant was to purchase the land of Williams, and was to let the plaintiff have it at the same price, that he, the defendant, gave Williams for it. And that if the defendant bought the land for \$2,200, and falsely represented, that he had paid \$2,560 for it, and that plaintiff had paid him \$2,560, under the belief that the defendant had paid this latter sum for it, then the plaintiff could recover.

To the refusal to give the second charge as requested, and to the charge given, the defendant excepted; and here assigns for error, the refusal to give the second charge requested, and the charge as given.

McLESTER, for plaintiff in error.

The charge requested was abstract, and should not have been given, as it leaves the right to recover, confined entirely to the supposed written contract. The qualification is proper and legal.

GUNN and COCKE, contra.

1. The written contract alone was the evidence of the

terms of the contract, and any parol contract, in reference to the subject matter of the contract, was merged in the written contract. 5 Porter, 498; Gilpin v. Consequa, 1 Peters's C. C. Rep. 86; 1 Ala. Rep. 161.

2. The charge given was ambiguous, and calculated to mislead the jury. The charge requested was simple, and appropriate to the evidence; the refusal to give it was error. 4 Ala. 116; 11 Id. 535, 1059.

DARGAN, J.—If the contract between the parties was reduced to writing, this written agreement is supposed to contain the entire contract, and it is not permissible to add other terms to the contract than those contained in the written instrument. 1 Ala. R. 161; 5 Porter, 498. The question should have been left to the jury to determine, whether there was a written contract, or not. If they found that the contract had been reduced to writing, they should then have ascertained the terms of it, from the parol proof, as the instrument had been destroyed. The second charge therefore requested, was a simple and appropriate charge, and should have been given. The charge given, in lieu of the charge requested, was calculated to mislead the jury. It was, that the plaintiff must prove a contract in writing, *or otherwise*, that the plaintiff in error, was to let the defendant in error, have the land at the same price, that he had to give Williams for it. The testimony of the plaintiff below tended to show, that the contract was a verbal one merely, and contained the stipulation, that Cole was to let Spann have the land, at the price he had to pay for it.

The testimony of the defendant below, tended to show, that the contract was reduced to writing, and did not contain this term. The charge requested by the defendant, was adapted to the evidence offered by him. The charge given might mislead the jury, in this, that from it they might think the plaintiff could recover, although the written contract did not contain this term, if the parol contract as proved by the plaintiff, did contain it, when the law clearly is, that all previous conversations, or verbal agreements, are merged in the written agreement, and the plaintiff's right to recover would

depend on the terms of the written contract, if indeed it had been reduced to writing.

The rule is, that if an appropriate charge is requested, and it is not given as requested, but a charge is given in lieu of the one requested, that is calculated to mislead the jury, it is error. See 4 Ala. Rep. 116; 11 Id. 535; 1059. If, however, the charge given, is not in the language of the charge as requested, yet if the charge given, is a full and fair exposition of the law, not calculated to mislead the jury, the judgment should not be reversed, because the party was entitled to the charge as requested. But in this view I am alone, the court being of opinion, that the party making the request, is entitled to have the charge given in the language requested. But in this case, the defendant was entitled to the charge requested, and the charge given might have misled the jury. For this the judgment is reversed, and the cause remanded.

CHILTON, J., not sitting.

GOVERNOR, USE, &c. v. BARROW.

1. It is not a sufficient ground for the interposition of chancery, after a judgment at law, that a witness called by the defendants, to prove that certain receipts had been paid in money, testified that they had been paid in jury certificates, by reason of which mistake the party lost the benefit of his payment.
2. Nor is it any ground of equity, that the witness was intoxicated. A party who voluntarily goes to trial, with a witness in this condition, does so at his peril.

Error to the Chancery Court of the 6th Chancery District.
Before the Hon. A. Crenshaw.

WATTS and DUVAL, for plaintiff in error.

PECK and BLOUNT, for defendant.

The defence at law was a good one, and it was defeated not by any fault or negligence on the part of the defendant. Is not this case, in principle, the same as though the defence at law had failed by reason of the loss of the receipts, without any negligence on the part of the defendant? If so, then the decree is right. Judge Story, in his Commentaries on Equity, says, if a judgment is recovered at law, by reason of the loss of a receipt, &c., which is afterwards found, chancery will enjoin the judgment, because it is inequitable to enforce the payment of such a judgment. 2 Story's Eq. § 894, 885, 886, 887.

Can this judgment be enforced, under the circumstances, without a violation of conscience? If not, then the decree is clearly right.

CHILTON, J.—The only question presented by the record in this case is, whether the chancery court should entertain jurisdiction of a bill to enjoin a judgment at law, upon the ground that the defendant at law failed to establish his defence by reason of the failure of a witness introduced by him, to prove certain payments. The witness, who was called by the defendant to show that certain receipts were paid in money, testified that they had been paid in jury certificates, by reason of which mistake of the witness, the party lost the benefit of such payments. It is insisted, that as the defence at law was a good one, and as it was defeated without any negligence or fault of the defendant in error, it is the same as if the receipt had been lost, and the defendant had failed in consequence of such loss. 2 Story's Eq. § 885-6-7, 894.

Courts of chancery, as will appear from numerous decisions, have evinced much reluctance as to entertaining bills to overhaul judgments of the law courts, when the subject matter set up as a defence has been decided upon by a jury and rejected. It is impossible however, from the infinite variety of circumstances which may attend the numerous causes

which occur, to lay down any general rule, which shall embrace each case. The nearest approach to the establishment of a general rule, as applicable to cases like the present, is found in the doctrine, "that courts of equity will not interfere by injunction to restrain the adverse party from availing himself of a judgment at law, unless he was prevented from making his defence, which is legal, by fraud or accident, unmixed with any fault or negligence on the part of himself or his agents." 2 Story's Eq. § 887.

Such has been the settled doctrine of this court. In the case of *McGrew v. The Tombeckbee Bank*, 5 Porter's Rep. 547, the complainant, against whom a judgment at law had been rendered under a supposition that he had no defence to make, (his principal being dead, and he not being advised of any defence, averred that he could not have availed himself at law of the defence of payment which had been made by his principal, because a knowledge of the facts did not reach him until long after the judgment had been rendered against him. It also appeared that two other parties to the same note had been discharged in the trial at law, under the same defence set up by the complainant, they having appeared and obtained a continuance of the cause as to them, at the term in which judgment was rendered by default against the complainant. The court decide the bill contained no equity. That the complainant should have resorted to the officers of the bank for information—should have consulted with his co-sureties, &c. It was dismissed at his cost. Besides it was said, the plaintiff's bill was in the nature of a bill for a new trial in a court of law, and in that view cannot perhaps be entertained. See also, *Mock v. Cundiff*, 6 Porter, 24; *French v. Garner*, 7 Ib. 549; *Smith & Meade v. Lowry*, 1 Johns. Ch. Rep. 320; Ib. 465; 4 Ib. 566; 6 Ib. 479; 7 Cranch, 336; *Henderson v. Roberts*, 18 Johns. Rep. 554; *Hunt v. Simpson*, 14 Ib. 63; *Harrison v. Harrison*, 1 Litt. R. 140. In *Drew v. Hayne*, 8 Ala. Rep. 438, it was held, that when a defendant in a suit at law fails in his defence, because the witness relied on to make it appear to the jury, fails to remember the circumstances which he is called to give in evidence, this affords no ground for equitable interposition. So in *Stinnett and Townsend v. The Br. Bank at Mobile*, 9 Ala. Rep.

120, it was held, a court of chancery will not grant relief against a judgment at law, merely because the judgment is inequitable, and the party was not allowed in equity to avail himself of a partial payment made by his principal, of which he had no knowledge before the judgment was obtained. The complainants in the case urging as an excuse for failing to attend the trial, the prevalence in Mobile, where the judgment was rendered, of an epidemic, the yellow fever, to an alarming extent. See also, *Br. Bank at Mobile v. Tilman*, 10 Ala. Rep. 149; *Jones & Spence v. Kirksey*, *Ib.* 579; *Mallory, et al. v. Matlock*, *Ib.* 595. In *Woodworth v. Vanbuskirk, et al.* 1 John. Ch. Rep. 432, it was held, by Kent, chancellor, that when a party went voluntarily to trial, if his principal witness deposed falsely, and contrary to his previous and repeated assurances to the complainant as to what he would prove, that the complainant should not be permitted in chancery to have a new trial for the purpose of impeaching the witness. These cases, and many others which may be found in the books, satisfy my mind fully, that there is no equity in the complainant's bill. To open the judgment at law, or perpetually enjoin it for the amount set up in the bill as paid by Cobb to the treasurer, would, under the circumstances shown by the bill and proof in this case, overturn a series of decisions of this court for several years past, and besides, would in my judgment lead to most mischievous consequences. We are neither advised by the bill nor the proof, as to the amount justly due and owing from Cobb and the complainant, his surety as tax collector, to the defendant. It may be that he owes greatly more than the jury have assessed against him, and the testimony of one of the witnesses strongly inclines the mind to this conclusion. The treasurer's books were open to inspection, as well as the books of the tax collector, and one of the main witnesses relied on as furnishing newly discovered evidence, was the attorney of the complainant in chancery, who managed his cause in the circuit court. There was evidence adduced before the jury, and the receipts were canvassed before them, as well as the books of the county treasurer, and although

the receipts were excluded from them, it is impossible to say the proof had no effect in diminishing their finding.

That the evidence of Dunn, the treasurer for the county, which was the ground of the complainant's surprise, was given in when he was, as he states, intoxicated, cannot warrant the chancery court in entertaining jurisdiction. If the party voluntarily goes to trial, upon the testimony of a witness in this condition, he does so at his peril, and if he sustain an injury by his incapacity from intoxication to testify correctly, it is worthy of inquiring whether he has not his remedy against the witness. In any aspect in which we can view the case, we are satisfied the complainant in the bill is not entitled to the relief sought. He has not shown such diligence either in acquainting himself with the facts of his defence, or in the manner of making it, as should entitle him to resort to a court of equity, and if he had, from all the circumstances surrounding the case, we should more likely do injustice to the defendant below, in granting the relief, than to him in refusing it.

Let the decree of the chancellor be reversed, and the bill dismissed with cost.

THE BANK OF MOBILE v. WILLIAMS.

1. A recovery may be had upon the common counts in assumpsit, of a bank, for the value of notes of the bank, proved to have been destroyed, without an affidavit of the loss, previous to the institution of the suit.

Error to the Circuit Court of Mobile. Before the Hon. J. Bragg.

THIS was an action of assumpsit, at the suit of the defend-

ant in error. The indorsement on the writ states the object of the suit to be, the recovery of seven hundred dollars—bills of the bank of Mobile, which were lost by the plaintiff, in the waters of Mobile and Alabama rivers, and which the defendant refuses to pay. The plaintiff does not declare specially, but his declaration embraces the common counts in *assumpsit*.

From a bill of exceptions sealed at the defendant's instance, it appears that the defendant moved to strike out the declaration, because it did not conform to the cause of action indorsed on the writ; which motion was overruled.

Plaintiff then offered a witness to prove, that he owned certain bills of the defendant, and that the same had been destroyed; to the introduction of this testimony defendant objected, upon the ground that there was no affidavit under the statute. This objection was overruled. Witness then testified that he was the bearer of a letter containing seven one hundred dollar bills of the Bank of Mobile, and one dollar and eighty-five cents in specie, the property of the plaintiff; that he accidentally dropped this letter in the Alabama river, while the steamboat on which he was a passenger was under way; that the boat was stopped, but nothing more was ever seen of the letter. Witness also proved a demand of the amount of these bills, made before this action was brought.

The court charged the jury, that it devolved on them to say, whether the bills were lost, so that they could never be presented for payment to the bank, and if they thus found, then they would return a verdict for the plaintiff. A verdict was returned for the plaintiff, and judgment rendered accordingly.

P. PHILLIPS, for the plaintiff in error, insisted, that the declarations varied from the indorsement on the writ; that the action on lost notes or bills is given by statute, and the want of an affidavit of the loss cannot be dispensed with by declaring in *indebitatus assumpsit*. Clay's Dig. 333, § 112; 382, § 9; 8th Rule of Prac. in Cir. and Co. Courts; 6 Ala. Rep. 842; 9 Id. 824. The question as to the destruction of the

bills should have been decided by the court, and not referred to the jury. 16 Johns. Rep. 194; 20 Id. 144; 12 Conn. R. 392; 5 Id. 331; 8 Id. 431. But no action at law can be maintained on negotiable paper, which has been lost. 6 Esp. Rep. 126; 3 Camp. Rep. 324; 7 Mass. Rep. 486; 3 Conn. Rep. 303; unless it has been destroyed. 2 Camp. R. 211; 6 Wend. Rep. 378.

J. A. CAMPBELL, for the defendant in error. A party may recover on the common counts against the maker of a note of which he is the legal holder. 2 Porter's Rep. 308; 5 Id. 154; 7 Id. 454; 1 Ala. Rep. 452; 6 Wend. Rep. 378. And it is only necessary to file an affidavit of the loss where the party sues on the bills as lost. 9 Ala. Rep. 823. The evidence of loss was sufficient, and the question whether the bills were beyond recovery was regularly submitted to the jury. 4 Wash. C. C. Rep. 253; 8 Conn. R. 431; 6 Wend. Rep. 379; 2 N. & McC. Rep. 464.

COLLIER, C. J.—The indorsement of the cause of action on the writ was sufficiently broad to authorize any form of declaring under which the lost bills could be recovered. The statute of 1828, "regulating judicial proceedings," and which prescribes the manner in which lost notes, &c., may be sued on at law, it has been decided is merely cumulative, and that it is competent to proceed in such cases as the common law courts entertained jurisdiction of, without the previous affidavit: *Further*, that where the security lost was negotiable, either by indorsement or delivery, if it appeared that it was *destroyed*, so that the party liable to pay it, could never be called on by any third person, the party entitled could sue at law, and upon proper proof recover the amount. *The Branch Bank of Mobile v. Tillman*, at the last term; *Hutchings's Adm'r v. The Branch Bank at Decatur*, at this term.

The question, whether the bills were so lost that they could never be presented to the bank for payment, was certainly an inquiry of fact, and was referred to the jury in intelligible and appropriate terms. It was then competent for the plaintiff to have instituted his action in the form in

which he did, and upon the jury finding the facts in his favor, he was entitled to a verdict and judgment.

There is no want of adaptation of the declaration to the case made by the proof. If the bills were in existence, they could have been given in evidence under the common counts in *assumpsit*. This is abundantly shown by the citations made by the defendant in error. And their contents, title of the plaintiff, and irrecoverable loss, being shown, it is clear, that the plaintiff might recover under a similar declaration. What we have said is decisive of the cause, and it remains but to add, that the judgment must be affirmed.

JORDAN v. LOFTIN, ET AL.

1. A party who can only prove his defence, by the testimony of a co-defendant, may have relief in chancery, after a judgment at law against him. In such a case, it seems it would not be proper to file a bill for a discovery, pending the trial at law.
2. A note signed by one as surety, on condition that another person also signs it as surety, and left with the payee for that purpose, cannot be enforced against the surety, unless executed also by the person indicated as co-surety.

Appeal from the Twelfth Chancery District. Before the Hon. A. Crenshaw, Chancellor.

ELMORE, for the plaintiff in error.

1. This is not a bill for discovery, but for relief. The defence could not have been made at law, unless by a bill of discovery, and if the discovery sought was denied, the party would have been without remedy. *Steele v. Lowry and McGehee*, 6 Ala. 124.

2. The defence is one that could not, under the facts, have been made at law, as Hill, the witness, was incompetent in the suit at law, by reason of his being a party, and not as the chancellor supposed, upon the grounds of interest. *Turner v. Lazarus*, 6 Ala. 875.

3. The delay or fault of a party affects him only where he could, by diligence, have made his defence at law, and not where it can be made only in equity. *McGrew v. Tombeckbee Bank*, 5 Porter, 547; *Mock v. Cundiff*, 6 Porter, 24; *French v. Garner*, 7 Porter, 549; *Hill v. McNeill*, 8 Porter, 432; *McClure v. Colclough*, 5 Ala. 65.

4. Hill is a competent witness either at law or in equity; so far as interest is concerned, his interest being balanced.

JUDGE, contra. 1. The bill was filed after judgment, and complainant shows no sufficient excuse for not having made his defence at law; the bill was therefore properly dismissed. *McGrew v. Tombeckbee Bank*, 5 Porter, 547; *Mock v. Cundiff*, 6 Porter, 465; *French v. Garner*, 7 Porter, 549.

2. It is true that Hill would have been an incompetent witness on the trial at law; is he not equally so in equity? A resort to a court of equity cannot make him a competent witness; neither can his answer as a co-defendant be evidence against defendant in error. Why then resort to equity, unless for discovery merely; and if for that purpose, to be sustained, the bill should have been filed before judgment.

3. The proposition to sever on the trial at law, can be of no avail to complainant. It was an unusual proposition, one which defendant in error was not bound, either legally or morally, to accede to, and which, if accepted, would have been fatal to his action; for although complainant agreed to release all error resulting from the severance, yet Hill, the principal in the note, did not.

DARGAN, J.—The plaintiff in error, filed his bill in equity, against the defendants, in which he alledges, that on the 12th of January, 1844, John Hill applied to him, to become his security to Joseph Loftin, for the sum of \$50 50, and informed him, that John Buck would join on a note for that

sum, as a co-security. That he consented to become bound as the security of Hill, jointly with Buck, and that Hill and complainant, went to the house of Loftin, for the purpose of executing a note for that sum, but that Buck was not present to join in the note, and complainant, in the presence of Hill and Loftin, refused to sign the note, unless Buck's name was also subscribed to it, and was about leaving the room. That Loftin then said to complainant, that if he would subscribe his name to the note, he would take the note to Buck, and get his name signed to it. That relying on the promise, that said Loftin would procure the signature of Buck, he signed the note with said Hill, and the note was then left with Loftin.

The bill further alledges, that Buck refused, and would not sign said note. That suit was commenced on the note in the circuit court of Lowndes, and judgment at law was rendered thereon, in favor of Joseph Loftin, against complainant, and John Hill, at the fall term, 1846, for \$57. That the complainant was unable to make any defence at law, because he could not prove the facts as alledged, by any person except by Hill, who was sued jointly with him, and that he was advised that Hill was an incompetent witness at law. That Hill is insolvent. The bill prays a perpetual injunction. The defendant, Joseph Loftin, answered the bill, and admitted the execution of the note, and the rendition of the judgment, but denied the other material allegations of the bill. On the coming in of the answer, the defendant Loftin moved to dismiss the bill for want of equity, which motion was granted, and the bill dismissed, and the only question therefore is, does the bill contain equity.

The chancellor, in his decree, treats the bill as one of discovery merely, and therefore should have been filed before the judgment at law was rendered. This is not the character of the bill. It is filed to enable the complainant to make a defence against the note on which the judgment is rendered, and which defence the complainant alledges he can only make, by obtaining the testimony of his principal in the note, who was sued jointly with him at law, and therefore the complainant could not obtain the benefit of his testimony upon the trial at law. Whether the testimony of Hill, his

co-defendant, will be sufficient to afford relief upon a final trial, we cannot now examine, but we can look only to the bill.

The rule is well settled, that to entitle a party to relief in a court of equity, against a judgment at law, when his defence could be made in a court of law, he must show that he has been prevented from making his defence, either by the fraud of the opposite party, or by some accident, unmixed with any negligence on his part. But if his defence could not be made at law, equity may interfere, and afford relief; and the rendition of the judgment at law, will not close the door to relief against him. 7 Porter, 549; 5 Id. 547.

If the object of the bill had been to obtain a discovery from the plaintiff at law, merely, he must then apply to equity before the rendition of the judgment. 8 Porter, 432. But the object of this bill, is to obtain the benefit of the testimony of his co-defendant, and although the judgment is rendered, yet we think he may come into equity for that purpose, if he could not prove the same fact by any other witness. For if we hold, that he must apply to a court of equity for the purpose of obtaining the benefit of the testimony of a co-defendant, in all instances, it might lead to a complex practice in a court of law, often injurious to the rights of the plaintiff. Pending the injunction as against one defendant, will, or can the plaintiff proceed against the other? If he does proceed, and obtains the judgment against one, and the bill is finally dismissed as to the other, he must then proceed, and have a second trial against the other. We think under the circumstances of this case, the rendition of the judgment at law, ought not to preclude the complainant from filing his bill; and looking alone to the face of the bill, we think there is equity in it; for if the complainant was induced to sign the note, on a promise made by Loftin the payee, which promise has not been complied with, and if the complainant would not have signed the note as the security of Hill, but on the faith of that promise, then he ought not to be compelled to pay it. The decree is therefore reversed, and the cause remanded.

BREWER AND HOLLY v. MORGAN.

1. No action can be maintained on a note, which was made upon the consideration of running a horse race, and before the race was run, delivered up by the stakeholder, although it is again put in circulation by two of the makers, upon a valid consideration, one of the makers not being privy to, or assenting to such re-delivery.

Error to the Circuit Court of Covington. Before the Hon. E. Pickens.

ASSUMPSIT by Morgan, for the use of John G. Barrow, to recover upon a promissory note for \$500, made by one John Chambliss, with the plaintiffs in error, payable to Morgan, who is the defendant in error. The suit was discontinued as to Chambliss, who was not served with process. The declaration contains but a special count upon the note. Judgment and verdict for the plaintiff below.

Upon the trial, a bill of exceptions was sealed, which shows, that Chambliss, the principal in the note, and one Sprowls, being about to run a horse race, they mutually executed notes with security for \$500 each, and deposited them in the hands of a stakeholder, as a forfeit, if the race should not be run. The note in suit was made for that purpose, and left with Barrow, for whose use the suit is brought, as a stakeholder. That Chambliss failed to run the race, and the said Barrow, before the time when the race was to be run, delivered the note to the defendant Brewer, saying "the money has been deposited, here is your note." That a few days thereafter, the same note was re-delivered to Barrow, by Brewer and Holly, upon an agreement that they would pay said note, if Barrow would give up to one Sprowls a negro held by him as a pledge for the payment of \$300, loaned by Barrow to Sprowls, which he accordingly did. There was no proof, other than such as the above transaction fur-

nished, that said defendants below were indebted to Sprowls. It further appears, that Barrow knew all about the consideration of the note.

Upon this state of facts, the court was asked to charge the jury, "that if Barrow knew the note sued on was given for the consideration and purpose as stated, at the time he received it, notwithstanding Holly may have promised to pay it, the plaintiff could not recover against him." Also, "that if they believe the facts herein stated, and if they found that Barrow received the note with a knowledge of its illegal consideration, he would not be an innocent holder, and therefore could not recover, although they might be satisfied that Holly promised to pay it, at the time Barrow received it." These charges the court refused to give, and the plaintiff excepted, and assigns the refusal of the court to give the instructions prayed for, as error, in this court.

WATTS, for the plaintiff in error.

1. The note sued on being executed for an illegal purpose and illegal consideration, is void ; and this is so, even in the hands of an innocent holder for valuable consideration, unless he is induced to take it (without knowledge or information on his part) by the representations of the makers, that they would pay it. See *Parker, et al. v. Callihan*, 5 Ala. R. 708 ; *Manning v. Manning*, 8 Ib. 138 ; *Givens v. Rogers*, 11 Ib. 543. The record in this case shows, that defendant in error was cognizant of all the facts, at the time he received it.

2. The delivery of the note sued on, to Brewer, one of the makers, after it had accomplished the purposes of its execution, extinguished it, even if it had been valid in its inception, and it could not be again put in circulation by Brewer and Holly, so as to make it valid, without the assent of Chambliss, the other and principal maker. And to put it in circulation under these circumstances, even for a valuable consideration, (Barrow the beneficial plaintiff being cognizant of all the facts,) was fraud on Chambliss ; and no recovery can be had on the note. See *Story on Prom. Notes*, § 425 ; *Wallace v. Branch Bank at Mobile*, 1 Ala. 569, and authorities there cited ; 1 Cow. 387, and authorities there cited ; *Foster v. Athenæum*, 4 Ib.

3. If the indebtedness of Sprowls to Barrow could be considered a sufficient consideration to sustain the promise on the part of Brewer and Holly, to pay that amount; yet no action can be had on the note, 1, because of the reasons stated in the first and second points made in this brief; and, 2, because the note sued on is for \$500—two hundred dollars more than the indebtedness from Sprowls to Barrow; which sum of \$200 being for an illegal consideration, renders the whole note void. See Clay's Dig. 257, § 1; Moore v. Tarlton & Payne, 3 Ala. 444; Story on Prom. Notes, § 190.

PRYOR, for the defendant in error, contended—1. That the charge as moved for, assumed the facts to be proved, and should have been rejected for that cause, if for no other. Smith v. Carrington, 4 Cranch, 61; U. States v. Bunham, 1 Mason, 57.

2. A note founded on a gaming consideration may support an action in favor of a *bona fide* holder, upon the promise of the maker. Manning v. Manning, 8 Ala. 138; Givens v. Rogers, 11 Id. 543. A promissory note which has been returned to the makers, is no longer a promissory note, and when the note in this case was returned to two of the makers, and by them re-issued upon a valid consideration, it was divested of its previous noxious qualities. Story on Bills, § 223. The re-issue of the note was a new contract, and the knowledge of Barrow of the illegality of the note in its inception, could not affect the new transaction.

CHILTON, J.—The note sued on, so far as its vitality depends upon the original consideration, is void under our statute, (Dig. 257, § 1,) being given to be staked upon a horse race. Besides, it was returned to the makers, and thus became extinguished as to Chambliss, one of the makers, who, so far as we are informed by the bill of exceptions, was not consenting to its again being put in circulation. It was however subsequently transferred by delivery by Brewer and Holly, upon a new and valid consideration, viz: the release of the slave pledged to Barrow, and it is averred, and proved, that Brewer and Holly agreed that they

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would pay the note upon its subsequent delivery to Barrow. The question then comes up, whether, by virtue of this subsequent arrangement, the plaintiff below could recover against the defendants *on the note*? We have already seen, the note based upon the illegal consideration was void, and it cannot be recovered upon as a note, based on such a consideration.

In *Guild v. Eager*, 17 Mass. Rep. 615, it is held, that a negotiable note once paid, cannot be afterwards transferred, where some party to the bill, or note, might be prejudiced, or troubled with a suit, who ought to be discharged. This doctrine received the approval of this court, in the case of *Wallace v. The Branch Bank at Mobile*, 1 Ala. R. 569. Applying the principle above stated, the plaintiff cannot recover upon *the note*, aside from the objection of illegality of consideration, if the note was cancelled by the payment of the money, before it was transferred to Barrow. Waiving the consideration of the objections as to the form in which the first charge was asked, we think the point, as to whether Barrow can recover under the proof declared in the bill of exceptions, is clearly and properly presented in the second charge, and under this proof, the plaintiff having acquired the note in the manner disclosed, cannot recover. The court erred in refusing the second charge.

The judgment is reversed, and cause remanded.

HALLETT AND WALKER, EX'RS, &C. v. ALLEN, &C.

1. Interest upon general legacies, is not demandable, until eighteen months after the grant of letters testamentary. The statute rate of interest furnishes the proper rule.
2. The right of a married woman to recover interest upon a general legacy, is not affected by the fact that no trustee had been appointed to act for

her; especially in a case where the executors had determined not to pay legacies, until the estate could be made available without a sacrifice.

3. Though the bill does not alledge the precise time when the letters testamentary were granted, the complainant may prove it under the general allegation.

Writ of error to the Court of Chancery setting in Mobile.
Before the Hon. A. Cienshaw, Chancellor.

THE defendant in error, the wife of Nathaniel Allen, by her next friend, Josiah Kennedy, filed her bill, alledging that Joshua Kennedy, of the city of Mobile, died, leaving his last will and testament, which has been admitted to probate in the orphans' court of Mobile, of which the plaintiffs in error were appointed executors. Among the bequests in the testator's will, is one in which the complainant claims to be the legatee, in the following terms: "Ninth. I do give leave, and bequeath to Mrs. Louisa Allen, the wife of Mr. Allen, and the daughter of Mrs. S. Phipps above mentioned, the sum of five thousand dollars, to be paid to her if single, or to trustees for her if covert—it being my intention that the legacy shall be for her sole and separate use, independent of the control of her husband, or of any right whatever in him."

It is alledged, that the testator left property to the value of a half million of dollars, over and above the amount of the debts and specific legacies, which has come to the hands of the defendants. Large amounts of real and personal estate have been distributed among the next of kin of the testator; but an ample estate still remains in the hands of the executors, and they have been frequently called on to pay the legacy embraced in the clause of the will above set forth.

The bill prays, that the defendants be decreed to pay the amount of the legacy, with interest, from a year after the death of the testator, to trustees for the use of the complainant, or otherwise, as may best carry out the intention expressed in the will.

The defendants failing to answer the bill, though they

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were duly served with *subpœna*, the same was taken *pro confesso*; and the register having reported a suitable person as a trustee, his report was confirmed, and the amount of the legacy, with interest at the rate of eight per cent. after the expiration of one year from the death of the testator, was directed to be paid to the trustee for the uses expressed in the will : *Further*, that defendants pay the costs of suit, and these several sums be paid out of the goods and chattels, lands and tenements of the testator, in the defendants' hands to be administered.

G. N. STEWART, for the plaintiffs in error, insisted that no interest was recoverable on the complainant's legacy, until the same was demanded, certainly not until it was demandable ; that the English rule which entitled the legatee to interest, after the expiration of twelve months from testator's death, at the rate of four per cent., though still in force as to the measure of interest, was modified by the statute which postpones the period when a legacy is demandable to eighteen months. And although this latter period has expired, if the estate is unsettled, and not in a condition to pay legacies, without defeating the intentions of the testator, their payment cannot be enforced ; and under such circumstances interest will not, of course be charged. Clay's Dig. 195, § 17 ; 196, § 23 ; 197 § 24 ; 283, § 2 ; 284, § 3 ; 618, Rule Prac. 51 ; 2 Roper on Leg. 184 to 188 ; 1 Id. 589 to 591 ; 1 Munf. Rep. 183 ; 3 Id. 201 ; 2 Lomax's Ex'rs, 136, 143 ; 8 Port. Rep. 380 ; 10 Ala. Rep. 974 ; 3 Pick. R. 213, 218 ; 14 Mass. R. 431 ; Ward on Leg. 314 ; 4 Ves. Jr. Rep. 630 ; 3 Atk. Rep. 629 ; 1 Johns. Ch. Rep. 3. The bill does not alledge when the defendants obtained letters testamentary, and the decree *pro confesso* does not admit a fact not stated in the bill.

J. A. CAMPBELL, for the defendant in error. The law made the legacy payable immediately, and the executors are chargeable with interest from the time when the payment could have been demanded. After the expiration of eighteen months, proceedings could have been instituted for its recovery. The right to interest is not affected by the fact

that Mrs. Allen was *covert*, and no trustee had been appointed to receive her legacy. It was the duty of the executors to pay it without a demand; consequently a demand was not a pre-requisite to the right to recover interest.—There is nothing in the condition of the estate to exempt it from the influence of the principle last stated. 2 Roper Leg. 185; 2 Lomax on Ex'rs, 152, 154; 2 Wms. on Ex'rs, 876; 2 P. Wms. Rep. 26; 3 Munf. Rep. 10; 1 Paige's Rep. 32; 1 McC. Ch. Rep. 148; 6 Johns. Ch. Rep. 33, 36; 1 Edw. Ch. R. 175.

COLLIER, C. J.—The act of 1812, “concerning the distribution of intestates estates,” requires the orphans' court, upon the application of any person entitled to distribution of an intestate's estate, any time after the expiration of eighteen months from the grant of letters of administration, to make distribution of the same agreeably to law. *Further*, any person entitled to a legacy, or any estate by will, shall be entitled to the foregoing provisions, “as in case of administrators.” Clay's Dig. 196, 197, § 23, 24. A statute passed in 1806, enacts, that “any person having a legacy bequeathed in any last will and testament, may sue for and recover the same at common law.” *Id.* 226, § 29. It is insisted by the plaintiffs in error, that the first act cited modifies the English rule in respect to the time when pecuniary legacies bequeathed in general terms, are demandable, and extends it to eighteen months from the grant of letters testamentary; and that interest cannot be recovered by the legatee until after the expiration of that period.

According to the common law, where legacies are given generally to persons under no disability to receive them, the payments ought to be made at the end of the year next after the testator's death. The law allows the executor one year from the decease of the testator to ascertain and settle the affairs of the estate; and presumes that at the expiration of that period, and not sooner, all debts have been satisfied, and the executor is then able properly to apply the residue among the legatees, according to their several rights and interest. If the testator's circumstances justify it, the executor has authority to discharge legacies sooner; for they vest at the

death of the testator, and the year allowed the executors, previous to compulsory payment, is merely an arrangement for their convenience and safety. 1 Roper on Leg. 579-80. Before the expiration of the year, a general legacy is not considered due, nor can the legatee claim it; so that no interest accrues for delay in the payment of the principal. 2 Roper on Leg. 188; 1 Ves. J. Rep. 366; 1 Sch. & Lef. Rep. 10; 8 Ves. Rep. 410; 10 Ves. Rep. 334; 13 Ves. Rep. 333; 6 Madd. Rep. 15. In legal contemplation, the right to the payment of a legacy, we have seen, exists at the end of the year, and carries with it the right of interest from that time till paid; the rule will not be varied because actual payment in many cases may be impracticable within that time. 2 Madd. Rep. 81. In *Pearson v. Pearson*, 1 Sch. & Lef. Rep. 10, the fund did not become disposable for the payment of the legacies, till near forty years after the testator's death: *Held*, that the legatees were entitled to interest after the year. See 13 Ves. Rep. 33. If the testator direct "that no interest shall be demanded on a legacy, but that the executor shall pay it off as soon as money can be raised by selling certain property," the legatee is not entitled to interest until a reasonable time for raising the money shall have elapsed; but after a reasonable time the executor will be chargeable with interest, unless he assign good cause for having failed to apply the property to the object for which it was intended. 3 Munf. Rep. 59.

If the time of payment of a general legacy is fixed by the will, the general rule is, that it will not carry interest before the appointed time of payment arrives. 4 Ves. R. 1; 3 Atk. Rep. 101. In *Cavendish v. Fleming*, 3 Munf. Rep. 198, the testator died in 1791, having bequeathed his property to be equally divided between his widow and daughter. In a suit in chancery against the executor, for an account and payment of the legacies, it was held that the defendant was not chargeable with interest on the daughter's portion of the estate, until after the time when her guardian was appointed, and notice thereof given to the executor. As to the interest on legacies, see further 2 Johns. Cases, 200; 4 Mass. Rep. 215; 3 Port. Rep. 350; 9 Sergt. & R. Rep. 409; 6 Watt's Rep. 67. It is scarcely necessary to remark, that the general rule

that a general legacy does not draw interest until the expiration of a year after the testator's death, has its exceptions; thus where the legatee is a minor, whom the testator is under a moral obligation to support, and for whom he has made no other provision, interest will be demandable immediately. 4 Mass. Rep. 208; 3 Pick. 213; 2 Roper on Leg. 192, *et seq.*; 2 Lomax on Ex'rs, 156, § 13, 14, 15.

Where a legacy is payable at a certain time, it will bear interest from that time, although it is not demanded. 2 Salk. Rep. 415; 1 Verm. Rep. 262; 3 P. Wms. Rep. 125; 2 Ves. Rep. 568; 3 Bro. Ch. Rep. 419; 6 Johns. Ch. Rep. 33, 35.

It is the rule in England, to allow but four per cent., on a legacy after the year, whether it were charged on the lands or personal estate. The ground upon which the court gives this rate of interest is, that the fund is supposed in the course of the year to come into the hands of the executor, who can there make of it four per cent. 2 Roper on Leg. 252, *et seq.* This rate of interest is adjusted with a view to the *premium* at which money can be reasonably obtained; hence, where money has appreciated, the court has in some instances increased the interest upon legacies. *Id.* 256. In *Brownlee v. Steel*, Walker's Rep. (Miss.) 179, the English rule of interest at four per cent. per annum, computed on legacies charged on personal property, at one year from the testator's death, was adopted. We have not this book before us, and are uninformed as to the reasoning by which the supreme court of Mississippi were let to adopt one half its legal rate, as the interest to be paid on legacies, and one year as the period from which the computation shall commence. The rule as applied in that State must be merely arbitrary; especially as interest on money there far exceeds what is allowed in England, and the act of 1812, which we have cited, was in force there.

The statute referred to, postpones the time when general legacies are demandable, from one year after the testator's death, to eighteen months after the grant of letters testamentary; and consequently upon such legacies no interest will be computed until after the expiration of the latter period. This conclusion results from the reasoning upon which the English rule as to time is founded.

It will not do to limit the legatees right to interest to four per cent. upon the ground that the estate charged with the payment of the legacy will produce so much, or that rate may be reasonably obtained for the use of the money. The means of payment may generally be made more productive; yet the interest cannot be permitted to fluctuate, but must conform to some certain standard. The difference between the law here and in England, forbids the adoption of the rule which we have stated exists there. Under such circumstances, to avoid a sliding scale of interest, and the uncertainty which would follow, we feel constrained to decide, that when interest is recoverable, it must be graduated by the statute rate. We know of no other criterion to which reference can with safety be had.

The rule of computation cannot injuriously affect general legatees; for if the estate chargeable to them is insufficient to pay them with interest, they will all abate their legacies *pari passu*. True, the residuary legatee may sometimes be the sufferer both here and in England, as where the estate is charged with more interest than it realizes. In such case, he should be watchful of his interests, and endeavor to quicken the diligence of the executor.

Letters from one of the executors to a legatee in the same predicament with the complainant, written in December, 1842, January, 1843, and December, 1844, declare that the executors are not in funds to pay legacies—admit the ability of the estate—propose to pay by giving up land, if the price can be agreed on, and threaten if sued to resist a recovery. Here is evidence to show that general legacies would not be paid until property could be converted into money. The last letter is dated but nine or ten months previous to the commencement of the present suit. Each of them indicate that a demand would be unavailing. The complainant is entitled to the benefit of this evidence, and if a demand was necessary to entitle her to recover interest, it is sufficiently excused, or rather, dispensed with.

It was not indispensable to the complainant's right to interest, that a trustee should have been appointed to receive her legacy; especially as the executors had resolved not to pay legacies, until the estate was made available without a

sacrifice. The orphans' court, or the court of chancery, might recognize the trustee, and adjudge the legacy to be paid to him. The case of Cavendish v. Fleming; *ut supra*, is not attempted to be sustained by any argument—the court merely announces its conclusion; and we are almost inclined to think, it was induced by a Virginia statute. Be this as it may, we have seen no case in which the same, or an analogous principle is recognized.

Although the bill does not alledge the precise day when letters testamentary were granted to the defendants, yet we think it entirely competent for the complainant under the general allegation to show the time. The decree *pro confesso* only admits the facts alledged in the bill, and consequently does not relieve the complainants from showing when they became executors.

What has been said is decisive of the case, and we have but to add, that the decree is reversed, and the cause remanded.

SAVERY v. SPENCE.

1. A court of equity, will not entertain a bill to enforce the specific execution of a contract in reference to personal property, unless compensation for a breach of the contract, will not give full, and complete redress, either from the nature of the contract itself, or from the peculiar character of the subject matter of the contract.

Error to the Court of Chancery of Talladega. Before the Hon. W. W. Mason, Chancellor.

THE bill was filed by the plaintiff in error. The bill, answers and proof, are sufficiently set forth in the opinion of

the court. The chancellor dismissed the bill, which is the matter now assigned for error.

L. E. PARSONS, for plaintiff in error.

1. The interest of one partner may be sold under execution, but chancery has jurisdiction to settle the accounts of the partnership, as well before as after the sale. 1. Because it is necessary to prevent the sacrifice of property. 2. That purchasers may know what they are buying. 3. To protect the rights of creditors of the firm; and 4. That the other partners may not be injured. *Winston v. Ewing*, 1 Ala. R. 129; *Moore & Co. v. Sample*, 3 Ala. R. 319.

2. In pleading, it is only necessary to state facts; the manner in which they are to be established, is to appear by the proof. 3 Ala. 458; 2 Id. 604; 2 Story's Eq. Pl. 245; *Smith v. Burnham*, 2 Sumner's Rep. 612.

MORGAN, for defendant.

1. The only averment in the bill which relates to any interest of Savery in the property, is in these words: "In 1843 or '4, Savery became, and still continues to be, jointly and equally interested with Spence in the purchase of six slaves," &c. This is not an averment of a partnership. *Cooper v. Eyre*, 1 H. Blackstone, 48; *Story on Partnership*, 380, § 264; Id. 47, § 30; *Carlyle & Offut v. Patterson*, 3 Bibb, 93-5.

2. Parties, whether joint owners, joint tenants, or tenants in common, have no right to go into chancery to settle a question of title; partners may do so, to have an account, and to assert a *lien* upon the partnership effects; but a court of chancery will only decree a partition, where the title is admitted. If at all, in the case of personal property. 9 Porter, 497; 3 Randolph, 361.

DARGAN, J.—The bill alledges, that the complainant, and Solomon Spence, became jointly, and equally interested, in the purchase of six slaves, Caroline and her five children. That Caroline, and four of the children, are in possession of complainant, and one of them in possession of Spence. That

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the bill of sale was executed in the name of Spence alone. That an execution at the suit of Walker, against Spence and others, has been levied on the slaves, as the property of Spence, and prays an injunction against the sale at law. That the slaves may be sold under the order of the court of chancery, and the proceeds divided, and the interest of complainant paid to him. Walker, the plaintiff in execution, and Spence, answer the bill. The answer of Spence denies that complainant has any right whatever in the slaves, or that he paid any part of the purchase money, and states that the slaves were sold under an execution belonging to Spence, against one Mitchell, and were purchased by Spence on his individual account, and that the executions were credited by the amount of the sale, and the expenses, and costs were paid by him. The answer however admits, that the complainant pointed out the negroes to the sheriff of Coosa county, as the property of Mitchell, and that he went from Talladega, to Coosa county, about forty miles, for this purpose. It also admits, that he (Spence) is liable to pay complainant for this service.

The answer of Walker states, that he knows nothing of the levy of the execution, nor to whom the slaves belong.

The proof fully shows, that complainant paid no part of the purchase money, but that the slaves were paid for as stated in the answer of Spence, and the only ground of the complainant's claim to the negroes, is, that he went to Coosa county, and pointed out the slaves to the sheriff, as the property of Mitchell. It also appears, that the complainant, and Spence, met at the office of Mr. Rice, in Talladega county, and it was agreed, that complainant should pay Spence \$875, in full of his interest. But the complainant failed to pay the money, at the time stipulated, so the contract was not consummated. Mr. Cox, and Mr. Rice, then understood, that the parties were jointly interested in the slaves, but no other consideration passed between the parties. Another ineffectual effort was made between the parties to settle the matters, and both seemed to treat the property as belonging to them jointly, but some difference arising, it was not consummated.

Another witness states, that before the sale, Spence informed him, that the complainant was to be equally inter-

ested in the profits of the slaves, if any were realized for his services, in disclosing to Spence where the property was, and going, and pointing it out to the sheriff, and we are satisfied, that this is the only foundation for the claim of the defendant, and that he has paid nothing on account of said slaves, nor borne any part of the expense incident to the sale.

The whole case made by the proof, shows that this is an application to a court of chancery, for a specific performance of a contract, in relation to personal property. No part of the purchase money has been paid by the complainant, nor is the title to the slaves in his name; but if he has any claim, or interest in them, it grows out of an agreement, that he should have an interest in the slaves, for disclosing to Spence where they were, and going from Talladega to Coosa county, and showing them to the sheriff. And he now seeks to enforce this contract in equity, upon the allegations that he and Spence were jointly interested in the purchase of the slaves. A court of equity will not decree a specific execution of a contract in reference to personal property, when compensation for the breach of the contract in damages, furnishes a complete and satisfactory remedy. See 2 Story's Eq. 26.

A court of equity, will in some instances interpose, and decree a specific performance of a contract, in reference to personal property; but then it must be shown, that a court of law cannot give full and complete redress by compensation in damages, for a breach of the contract, either from the nature of the contract itself, or from the peculiar character of the subject matter of the contract, neither of which is shown in the present case, and therefore the complainant should be remitted to a court of law, which is fully competent to give redress in this case, if there has been a violation of the terms of any contract in reference to the slaves.

Let the decree of the chancellor, dismissing the bill, be affirmed.

CHILTON, J., not sitting.

GORDON v. PHILLIPS.

I. P represented to G, that a tract of land he was about to sell him in the State of Georgia, contained 240 acres, and thereupon conveyed it to him by deed, reciting that the tract contained 240 acres, more or less. The vendor afterwards agreed, that if the plaintiff would go on and take possession, and the land should fall short of 240 acres, he would make good any deficiency: Held, an action of assumpsit will lie for the breach of this contract.

Error to the County Court of Macon.

ASSUMPSIT by the plaintiff in error. By a bill of exceptions, it appears, the defendant sold the plaintiff a tract of land in the State of Georgia, which he represented to contain 240 acres, and conveyed it to him by deed, which recites, that the tract contained 240 acres, more or less.

It was proved, that the defendant afterwards told plaintiff to go on, and take possession of the land; that the plaintiff was distrustful about the quantity of land, but the defendant promised to go to Georgia, and examine the land, and if it fell short of the estimated quantity, he would make good the deficiency; and the evidence conduced to prove, that but for this promise the plaintiff would not have taken possession of the land. It was proved, that the land contained but 202½ acres, and that the defendant had previously sold a part of the same tract, and conveyed it by deed. The court charged the jury, that conceding the evidence to be true, they must find for the defendant. This was excepted to, and is now assigned as error.

S. WILLIAMS, for plaintiff in error.

G. W. GUNN, for defendant in error, insists that there is no error in the rulings of the court—

1. Because the evidence offered sought to contradict the written contract, or was merged in the same.

2. That if there was fraud, the same was afterwards affirmed by reception of the deed.

3. Because case, and not assumpsit, was the proper remedy, if plaintiff had any. See 7 Ala. Rep. 185; 1 Ib. 320; 6 Ib. 785; Br. Bank at Mobile v. Cullum, 4 Ib. 21; 6 Ib. 303; 9 Ib. 772;

CHILTON, J.—The county court, in excluding the testimony of Jackson, as to the conversation of defendant, had in August, 1843, as well as in its charge to the jury, “that if they believed all the evidence, they could not find for the plaintiff,” acted, doubtless, under the supposition that the plaintiff had misconceived the form of action appropriate to his relief. It is certainly true, that the plaintiff was proceeding to recover for breach of defendant’s contract, or for the fraud or deceit practiced upon him by Philips, in representing the land as containing 240 acres, when he knew it did not, he could not recover in assumpsit, but must either resort to covenant on his bond, or deed, or to his action of case, for the tort. Such was the decision in *Morgan v. Patrick & Smith*, 7 Ala. Rep. 185. But it does not follow, that because the vendor may have made false and fraudulent representations as to the quantity of the land which he has sold, and for which fraud an action of deceit would have lain, that he may not afterwards make a promise or contract, based upon such representations as will sustain assumpsit. The deceit which he has practiced to the injury of the vendee, furnishes a strong moral, as well as legal obligation to make restitution. The plaintiff could not recover in the form of action here resorted to, for the fraud, but if, as he contended, and as the evidence conduces to show, the defendant afterwards agreed, if the plaintiff would go on and take possession, and the land, upon an actual survey should fall short of 240 acres, he would make good, by payment, any deficiency, the action of assumpsit would lie to recover for a breach of this contract, and the plaintiff would be allowed to prove the representations of the vendor at the time of the sale, as inducement to the contract, and as establishing its considera-

tion. The action of assumpsit is maintainable, wherever there is an express contract not under seal, to pay money, or perform a duty, or where one can be implied from the circumstances in proof. Chit. Pl. 93.

As a general rule, it is too well established to admit of any doubt, that all parol negotiations between the parties to a written contract, anterior to, or contemporaneous with, the execution of the instrument, are to be considered as merged in the written agreement, but the rule is not to be extended so as to embrace agreements *subsequently* entered into. See *Brewster v. Countryman*, 12 Wend. 446; *Richardson v. Hooper*, 13 Pick. Rep. 446; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Munroe v. Perkins*, 9 Pick. 298; *Fleming v. Gilbert*, 3 Johns. Rep. 528. Nor does it extend to collateral and independent facts, about which the writing is silent. *Gerrick v. Washburn*, 9 Pick. Rep. 338; *Hall v. McCubbin*, 6 Gill. & Johns. 107.

The proof conduced to show, that notwithstanding the plaintiff accepted a bond, and afterwards a deed of conveyance for the land, describing the quantity as 240 acres, "more or less," that there was a contract subsisting between the parties, at a time subsequent to the execution of the conveyance, to pay for the deficit in the quantity of acres. And the proof offered, and rejected by the court, further conduces to establish the fact, that the plaintiff, in consideration of this subsequent agreement, was induced to take possession of the land. True, the conversation proposed to be detailed by the witness, had after the consummation of the purchase, is by no means conclusive, but it is relevant, and could not therefore be properly rejected.

The charge asked by the plaintiff, "that if the jury believed the plaintiff purchased from the defendant a lot of land in Georgia, and took from him a bond for title, conditioned to convey 240 acres, more or less, and afterwards, and before the plaintiff took possession, he ascertained there was a deficiency in the quantity, and complained to defendant, and that the defendant thereupon insisted said tract did contain 240 acres, but told plaintiff to go and take possession of the land, and that they would measure it, and he would pay for any deficiency, and there was a deficiency, they should find

for the plaintiff," we think was properly refused by the court. The contract stated in the charge, proposes that the land should be measured by the parties, and that the plaintiff should take possession of it, whereas it seeks a recovery without any affirmance by the jury of either of these facts. Besides, there is no count on such a contract in the declaration, and as the charge assumes it as executory merely, and not executed, the plaintiff was not entitled to recover under the declaration. See *Dukes v. Lowie*, at the last term.

For the error we have noticed in excluding the testimony offered, which, as we have seen, conduced to prove an executed contract, upon which the plaintiff, under the common counts can recover, if he can sufficiently prove it, the judgment of the county court must be reversed, and the cause remanded.

PETTY V. DOE EX DEM. GRAHAM.

1. In an action of ejectment, a notice to quit is not rendered necessary, by proof of a contract between the defendant, and a stranger, between whom and the lessor of the plaintiff, no connection is shown in respect to the title of the property.

Writ of Error to the Circuit Court of Mobile. Before the Hon. John Bragg.

THIS was an action of ejectment for the recovery of certain real estate, situated in the city of Mobile. The defendant confessed lease, entry and ouster, pleaded not guilty, alledged that he was in possession under an adverse claim of title for more than three years previous to the institution of this suit, and had made permanent and valuable improvements on the premises since the year 1836.

On the trial, the defendant excepted to the ruling of the presiding judge. The facts, so far as material, may be thus condensed: Defendant went into the possession of the premises under the instruction, and by the permission of Joshua Kennedy, and was to remain in possession until Kennedy should otherwise order, who upon the payment of \$700 by the defendant, agreed to make a title to the latter. It was also proved that buildings had been erected on the premises since the year 1836, of the value of \$75, by the defendant.

The defendant's counsel prayed the court to charge the jury, that the defendant was entitled to notice to quit before an action could be commenced against him, which charge was refused; and thereupon the defendant excepted. The jury returned a verdict for the plaintiff for a part of the premises described in the declaration, without finding any damages for the rents, or the value of the improvements; and judgment was rendered accordingly.

J. TEST, for the plaintiff in error.

A. F. HOPKINS, for the defendant in error.

COLLIER, C. J.—The judgment entry affirms that the defendant pleaded guilty; but this we think must be a mistake, as the verdict finds the defendant guilty of withholding the possession of a part only of the land sought to be recovered. It does not appear that there is any connection between the plaintiff's lessor and Joshua Kennedy, certainly not that the former deduced a title from, or held under him. We cannot then perceive how a contract between the defendant and Kennedy can devolve a duty upon the lessor of the plaintiff, if his right was paramount to, and independent of the claim of Kennedy. There is nothing in the record to indicate that the latter had even the semblance of title, and the court could not upon the prayer for instructions, assume such to be the fact. If then the plaintiff's title is not subordinate to Kennedy's, or derived through him, a notice to the defendant to yield up the possession was not a pre-requisite to the plaintiff's right to sue; however imperative it might be

on Kennedy, were he the actor against the defendant. This view is decisive to show that the charge prayed was properly refused, and the judgment is therefore affirmed.

REED v. HUDSON.

1. A marriage had in Alabama, is not necessarily void, because the parties had been previously married, and divorced in the State of Georgia. Whether a prohibition in the sentence of divorce against the parties, or either of them marrying again, made in the State of Georgia, would render invalid a subsequent marriage of the same parties in Alabama, *quere*.
2. To render a marriage in Alabama invalid, it is necessary to show those facts, the existence of which deny to the parties the right, or capacity to intermarry, by the law of this State.

Error to the Circuit Court of Chambers. Before the Hon. G. Goldthwaite.

THE plaintiff below declared in assumpsit against the plaintiff in error. She pleaded coverture. On the trial a bill of exceptions was taken, the language of which is as follows: It was in evidence that the defendant and Benjamin G. Reed intermarried in the State of Georgia, and were there divorced; the defendant obtaining the divorce; and that afterwards they intermarried in the State of Alabama, which last marriage, if valid in law, remains in full force, and since which last marriage the note sued on was executed.

The court charged the jury that the second marriage in Alabama was null and void, under the statutes of this State. This charge is here assigned for error.

ALLISON, for the plaintiff in error.

The first point in this case is, to determine the nature of this divorce, and in doing this, no statute law of Georgia on divorces being pleaded, this court, in accordance with previous decisions, will determine this cause according to the laws of England, which is presumed to prevail in that State; and by the laws of England, two kinds of divorces are permitted, *a vinculo* and *a mensa et thoro*; the first is for some canonical cause, that existed at the time of the marriage, and made it unlawful for the parties to contract marriage; both are equally guilty of a violation of law; both may contract marriage, and both may marry again, and strictly speaking, it cannot be said to be a divorce from the bonds of matrimony, because a divorce supposes a valid marriage; it is but declaring the unlawfulness of the marriage, the incapacity of the parties to marry. 1 Bl. Com. 353-4; Shelford on Mar. & Div. 192-3; Head v. Head, 2 Kelly's Rep. 191.

The second kind is of a very different nature from the first, it is permitted when the marriage was just and lawful, but for some cause after the marriage, the parties may be separated, for a definite, or indefinite time, and the relation of husband and wife still subsists between the parties, and the law contemplates a reconciliation of the parties. 1 Bl. Com. 354; Shel. on Mar. & Div. 192-3.

Now I assume the position, that this divorce is of the second kind, because the proof shows, that divorce was granted to the plaintiff in error; and secondly, because by the rules of law, it cannot be construed into a divorce of the first kind.

1. When the record discloses that the proof was, that a divorce was granted, in another State, and no statute law of that State being pleaded, showing the nature of divorces in that State, the legal construction of such a divorce is, that it is *a mensa et thoro*, and the parties have the right to cohabit together again, or may intermarry a second time. 1 Bl. Com. 353-4; Shel. on Mar. & Div. 192-3; Head v. Head, 2 Kelly's Rep. 191.

2. The facts show that this was a divorce *a mensa et thoro*, and that the parties had a right to cohabit together again, or to intermarry a second time. 1 Bl. Com. 354; Shel. on Mar. & Div. 192-3.

There is no statute in this State prohibiting persons divorced in another State from intermarrying in the State of Alabama, and the court erred in the charge to the jury, and if they do intermarry, there is no statute of Alabama declaring the marriage null and void.

RICHARDS, contra.

DARGAN, J.—The validity of the contract of marriage, depends on the law of the place where it is celebrated, and when a marriage is shown to exist, the law presumes it a valid contract until the contrary is shown.

The fact, that the plaintiff below showed that the defendant and Benj. G. Reed had been married in the State of Georgia, and had been divorced in that State from each other, before their intermarriage in Alabama, without further proof, was entirely insufficient to show that their marriage in Alabama was illegal. What the cause of divorce was, does not appear, nor the legal consequences that attached to the sentence of divorce in the State of Georgia. The rule is settled, we think, that where a divorce is granted in one country, and the offending party is prohibited by the law of the country pronouncing the divorce, from marrying again, that if he, or she, remove to another country, where this disability does not exist, and there marries, such marriage is not unlawful. See Story's *Confl. of Laws*, 87, § 89; 8 *Pickering*, 433; *Putnam v. Putnam*, 1 *Pick.* 596; *Kent's Com.* 91-2.

To render the marriage in Alabama invalid, therefore, it would be necessary to show those facts, the existence of which deny to the parties the right or capacity to intermarry by the laws of Alabama; and the simple circumstance, that a foreign jurisdiction has divorced this defendant and Reed, who had intermarried in Georgia previous to their marriage here, shows no legal impediment to their intermarrying again in this State. We intend however to confine our opinion to the precise point made by the bill of exceptions, and not to

anticipate the questions that by possibility may arise hereafter.

The court clearly erred in the charge given, and the cause is reversed and remanded.

CITY COUNCIL OF MONTGOMERY v. HUTCHINSON AND SCOTT.

1. The action of the common council of the city of Montgomery, declaring a house in the city, from its dilapidated condition, endangering the lives of passers by, a nuisance, is *prima facie* evidence of the fact, casting on the party complaining of the act of the city, directing the rasure of the house, the burthen of proving it was not a nuisance.

Error to the Circuit Court of Montgomery County. Before the Hon. G. D. Shortridge.

ACTION on the case, for injury done by plaintiff in error, to the house of defendants in error. Plea, not guilty.

J. D. F. WILLIAMS, for plaintiff in error.

1. The legislature may, from time to time, in establishing police regulations, prescribe the manner of exercising individual rights over property. *Vanderbilt v. Adams*, 7 Cowen, 351. The legislature may therefore authorize any municipal authority to abate nuisances within its jurisdiction. *Ib.*

2. By its charter, the city council of Montgomery is authorized "to prevent and remove all nuisances, at the expense of the person causing the same, or upon whose property it may be found." Acts of Assembly, 1837-8, sec. 5 of charter.

3. If therefore, in removing nuisances, the city council do not exceed their authority, no right of action accrued to the

City Council of Montgomery v. Hutchinson and Scott.

plaintiff below, even though they were damaged by the act of the council. *Governor, et al. v. Meredith, et al.* 2 Durnford & East, 433.

4. If, in such a case, loss ensues to the individual, the law regards it as a loss without an injury, because he shares the advantages of such police regulations. *Vanderbilt v. Adams*, 7 Cowen, 352.

5. The plaintiff below could not show that the nuisance did not exist. The city council, possessing jurisdiction, was the proper tribunal before whom to litigate the question. *Vannermer v. Mayor of Albany*, 15 Wend. 264.

BELSER & HARRIS, contra.

1. The charges asked and refused by the court, were abstract. They did not fairly arise on the evidence, and were calculated to mislead the jury. Hence, they were properly refused. *Horsefield v. Adams*, 10 Ala. R. 9; *McBryde v. Thompson*, 8 Ala. R. 650; *Randolph v. Carlton*, 8 Ala. R. 607; *Clarke v. Lane*, 1 Scammon's R. 229.

2. The city council, according to their charter, had no right to have the whole house pulled down, but only so much of it as was a nuisance. Corporations are responsible in damages, for the negligent, or violent acts of their agents, and for all the consequences, which flow from such acts. *Godloe v. City of Cincinnati*, 4 Ohio, 513; *Merrill v. Man. Co.* 10 Conn. 384; *Riggs v. Dickerson, et al.* 2 Scammon, 437; *Johnson v. Castleman*, 2 Dana, 379; *Hardin v. Kennedy*, 2 McCord, 277; *Nelson v. Smith*, 10 Wendell, 324; *Townsend v. Sus. Turn. Co.* 6 Johns. 91.

3. The charges given by the court, as contained in the bill of exceptions, and not objected to, covers the entire law of the case, arising on the facts presented in the record, and the jury found against the plaintiff in error, in the court below. *Pinkston and wife v. Green and wife*, 9 Ala. 19; 7 Ala. 162; *Caruthers, et al. v. Mardis, adm'r*, 3 Ala. R. 599; *Randal v. Redding*, 1 Branch (Flo.) 409.

CHILTON, J.—It appears that the plaintiff in error, having by its charter “the power to remove all nuisances at the expense of the person causing such nuisance, or upon whose

property it may be found," &c. determined that the brick building on the west side of Commerce street, in the city of Montgomery, the property of Jonathan Hunt, was in a falling and dilapidated condition, rendering the passage on the western side-walk dangerous, and it was resolved by the council, that as the agent of the owner of the building refused, after being duly notified, "to take cognizance of the pulling down the same," that the mayor of the city proceed forthwith to raze the building. It was further proved, that the house of the said plaintiff and the said Hunt adjoined each other on one of the main streets in the city of Montgomery, and that a part of the front wall of Hunt's house was in a dilapidated condition, and calculated to endanger the lives of those who passed by it, but that no other part of the same was in this condition. That both houses were built of brick, and part of the front wall of Hunt's house had fallen. The proof showed that the agents of the plaintiff in error had pulled down the front wall of Hunt's house, which was connected with the wall of the defendants' in error, by means of a rope attached to the gable end of the same, and that they had taken down the whole house except a portion of the wall immediately attached to the wall of the said defendants. That during the abating of the said supposed nuisance, an agent of the council was seen prizing with a plank between the wall of said Hunt and defendants' wall, who stopped upon the request of defendants. After pulling down Hunt's wall, a large space or aperture was seen in the wall of said defendants, and Hunt's cellar shortly thereafter filling up with water on account of some hard rains which fell, the remainder of Hunt's wall fell with the defendants' into the cellar. There was some conflict of proof as to whether the wall of Hunt was negligently thrown down. The court, under this state of facts, was requested to charge the jury, that if they believed Hunt's house could not have been pulled down without injury to the house of the plaintiffs below, and if no more damage was done to the plaintiffs' house than was unavoidable, the plaintiffs cannot recover. 2. "If the jury believe that without any action of defendants, Hunt's house would have fallen, and plaintiffs' wall with it, from the effects of the rain which fell, then the plaintiffs could not

recover." The court refused these charges, and the attorney for the city council assign this refusal as error in this court, insisting, that as the council had by statute, jurisdiction to abate nuisances, the ordinance requiring Hunt's house to be taken down could not collaterally be questioned.

It will be observed, that the first charge asked, assumes that it was necessary to pull down Hunt's house, and if it had been proper for the inquiry of the jury, whether the whole house was really a nuisance, or whether only a part of it was, and whether, if such part only had been abated, any injury would have resulted to the plaintiffs below, then the charge would have been improper. For, if the ordinance of the city council was not conclusive of the fact, that the whole house was a nuisance, the court should not assume that fact as proved, as the evidence upon it was conflicting. This presents a question of serious import, and one not at all free from difficulty.

In the case of *Vannermer v. The Mayor, &c., of Albany*, 15 Wend. Rep. 264, where the board of health adjudged certain premises to be a nuisance, and an ordinance was passed by the corporation, directing it to be abated, and the corporation was sued in trespass for the act of its agent in carrying the ordinance into effect, it was held by the court, (Savage, C. J.) that the plaintiff in such action was not at liberty to show, that the nuisance did not in fact exist at the time of the adjudication; and also, that it was not competent for him to show any irregularity or non-compliance with the ordinance on the part of the board of health. The court in the above case proceeded upon the ground, that the plaintiff in the action at law, cannot collaterally impeach the ordinance. Now it seems clear to my mind, that inasmuch as the jurisdiction of the council depends upon the fact, as to whether the house was, or was not a nuisance, it should have been allowed the plaintiffs below to have shown the court had no jurisdiction, by showing the premises complained of were not of the character adjudged by the ordinance. This action of the city council cannot be assimilated to the judgment of a court of competent jurisdiction, which may not be collaterally impeached. To hold that the council could, by its fiat, determine that a certain house was a nuisance, which

was manifestly otherwise, and that the order for its abatement should preclude an inquiry into the fact, would be in my judgment to deny the party whose property is thus wrongfully taken from him, the right of trial by jury, and to deprive him of his property by any other than "due course of law." In the present case, however, the defendants were neither parties nor in any way privy to the order passed by the council, and they had not the power, if they had been never so much aggrieved by the order, of reversing it by *certiorari*. They are not therefore estopped by the record; and the highest effect which it can have as evidence, is to cast upon the plaintiff below the burthen of proving that the council acted without authority of law, in deciding the house of Hunt to be a nuisance, when it was not. In other words, it is a *prima facie* protection to the council, casting the burthen of proof upon the party calling the act in question. See *Goodhue v. City of Cincinnati*, 4 Ohio R. 513.

We therefore conclude, that it was not error to refuse the first charge asked, inasmuch as it assumed as a fact beyond the inquiry of the jury, that Hunt's whole house was a nuisance.

The second charge asked is abstract; and besides, is predicated upon a contingency, the happening of which is too remote and uncertain to become properly the foundation of a charge.

It appears from the charges which were given, that the whole merits of the case were properly submitted to the jury. Our conclusion is, the judgment should be affirmed.

CROMWELL, HAIGHT & CO. v. KIDD & CO.

1. A direction to the holder of a note, "to return it to R S & Co., our agents in Mobile, who will pay it on presentation," is a declaration, that the note will be paid by R S & Co. on presentation, and does not make R S & Co. the agents of the holder when the note is returned to them, whatever may have been their relation to the holder in regard to the note previously.

Error to the Circuit Court of Shelby. Before the Hon. G. D. Shortridge.

ASSUMPSIT by the plaintiffs in error. From a bill of exceptions, it appears that the action was founded on a note of the defendants, payable to the plaintiffs, nine months after date, at the office of Rhea, Sykes & Co., Mobile, Alabama. That it was protested for non-payment, and placed in the hands of an attorney for collection. That whilst in his hands, defendants wrote to plaintiffs, who resided in New York, to "return the note to Rhea, Sykes & Co. our agents in Mobile, who will pay it on presentation." That upon this request, plaintiffs sent the note to Rhea, S. & Co., and informed the defendants they had done so. That the defendants sent cotton to Rhea, S. & Co., who were their factors, which they sold, and delivered the note to defendants, in accounting for the proceeds of the cotton; but never paid it to plaintiffs. Rhea, S. & Co. have failed.

The plaintiffs asked the court to charge, that upon the facts as above stated, if believed by them, they were entitled to recover; which charge the court refused to give, and they excepted. This is now assigned as error.

WOODWARD, for the plaintiffs in error.

The letter requesting plaintiffs to send the note to Rhea, Sykes & Co., was in such terms as authorized plaintiffs to send the note directly to Rhea, Sykes & Co.; and if so, Rhea,

Sykes & Co. were the agents of defendants, and defendants were bound to see to the proper application of funds placed in the hands of their agents, and if they placed means in their hands for the payment of the note, which was never paid to plaintiffs, they are still liable, although Rhea, Sykes & Co. delivered them the note.

But if Rhea, Sykes & Co. were not the agents of Kidd & Co., but the agents of Cromwell, Haight & Co., then the transfer of the note in satisfaction of a previously existing liability of Rhea, Sykes & Co. to Kidd & Co., was no payment of the note, and Kidd & Co. are still liable to plaintiffs for the amount of it. Bailey on Bills, 114, note, v; 5 Johns. Ch. 54; Johns. Rep. 637; Bailey on Bills, 131, and note, g; Ib. 133-4 and 394, note, 62.

If Rhea, Sykes & Co. were the agents of both, Kidds are liable. Chit. on Bills, 201-2. And if either of these positions be right, the court erred in refusing the charge requested. The plaintiff could sue upon the original consideration, beyond doubt, under the circumstances of this case. 10 Ala. Rep. 755.

S. F. RICE, for defendant in error.

1. There was evidence tending to show, that Rhea, Sykes & Co. were the agents of the plaintiff, to receive the money due on the note, and that they were also the agents of the defendants to make the payment of the note. As Rhea, S. & Co. were thus the agents of both parties, the note was discharged as soon as they received the money appropriated by the defendant for its payment. It can make no difference that they received the money from the proceeds of the sales of defendants' cotton. It is enough if they received the money, as the agents of the plaintiffs for that purpose, and surrendered the note *bona fide* to the defendants.

The evidence shows, that the note was made payable at the office of Rhea, Sykes & Co. at Mobile—that it had been in their possession before its maturity; and that they were the agents of the plaintiffs to receive the payment, and to surrender the note on receiving the money. If the plaintiffs have never received their money from their agents, Rhea, S.

& Co., that gives them no right to compel the defendants to pay the note a second time. The plaintiffs must look to Rhea, S. & Co. for their money.

The charge asked by the plaintiffs' counsel was properly refused, because it assumes that the defendant is liable in this action, if Rhea, Sykes & Co. were the agents of the defendants, and have never paid over the money to the plaintiffs, although Rhea, Sykes & Co. were the agents of the plaintiffs, as well as the agents of the defendants. There was no error in refusing to give the charge, because it does not refer to the jury the question, whether Rhea, Sykes & Co. were not the agents of the plaintiffs, to receive payment of the note, and to surrender the note. Only a small portion of the evidence is set out in the bill of exceptions, and no error is affirmatively shown, in the refusal to charge as asked by plaintiffs. The evidence on which the charge was based, is not pretended to be set forth. But only a small portion of the evidence is set out, and the request to charge does not even profess to be based upon the portion thus set forth. All presumptions are made against the party excepting.

COLLIER, C. J.—The defendants, in writing to the plaintiffs thus, “return the note to Rhea, Sykes & Co. our agents in Mobile, who will pay it on presentation,” must be understood to have meant what the language employed indicates, viz : that the note should be paid by Messrs. R, S & Co. if it was presented or returned to them. It cannot be important as to the manner of its presentation or transmission. The terms used, authorized the inference that the defendants' agents had received instructions to take up the note upon its being presented for payment, either through the medium of the post office or otherwise. No neglect seems to be attributable to the plaintiffs—they confided in the assurance of the defendants, promptly complied with their request, and that the latter might quicken the diligence of their agents, informed them of what they had done.

The fact that the note was payable at the office of Messrs. R, S & Co. and protested for non-payment at its maturity, when connected with other facts disclosed, show, that by the

return of the note, the plaintiffs should transmit it to them, or cause it to be presented; and upon doing either, the defendants engage it shall be paid. It cannot be inferred that R, S & Co. were the agents of the plaintiffs for the collection of the note when it was returned, whatever may have been their character when it was in their hands to receive the amount of it upon its maturing. It is not unworthy of remark, that the defendants, when advised that the note had been returned, made no objection to it; thus leaving it to be inferred, that such was the disposition they desired to be made of the note.

In no point of view, can we consider the letter of the defendants less potent than an undertaking for the fidelity and punctuality of their agents, and if they have been deceived, or prejudiced, they must abide the consequences. The fact that R, S & Co. are still the debtors of defendants, even after delivering up to them the note in question, and receiving a credit for the amount, can have no influence upon the plaintiffs' right to recover. This view is decisive of the case, and we have but to add, that the judgment is reversed and the cause remanded.

GEE v. THE ALABAMA LIFE INSURANCE AND TRUST CO.

1. The Alabama Life Insurance and Trust Co., has authority under its charter, to purchase a bill of exchange.
2. *Mandamus* is the proper remedy to revise the action of an inferior court, in quashing, or refusing to quash, an ancillary attachment.

Writ of Error to the County Court of Wilcox.

THE defendant in error, sued the plaintiff, as drawer of a bill of exchange for \$10,000. After the writ was issued, the

plaintiff sued out an ancillary attachment, which being levied, and returned, the plaintiff in error filed a plea in abatement to this process, to which plea the defendant in error demurred, and the demurrer was sustained.

On the trial, the testimony of N. J. Tisdale was introduced, which shows, that the bill described in the declaration, was made for the purpose of obtaining a loan of money from the company, and that the company received the bill of the Gees, and gave them the money for it.

On this proof, the defendant below requested the court to charge the jury, that if they believed that the bill was not negotiated to the company, for the purpose of enabling the company to transmit its funds to meet its engagements entered into by the company, in the prosecution of its lawful business, but was a direct loan of money to the Gees, and was drawn and negotiated for that purpose, that the plaintiff could not recover on the bill. This charge the court refused, and the defendant excepted.

The errors here assigned are—

1. The sustaining the demurrer to the plea in abatement.
2. The refusal to give the charge requested.

GEE, for the plaintiff in error, contended, that corporations have only those powers, and capacities, conferred by their charter, and such as are necessary to a full enjoyment and exercise of those powers expressly given, but no other. And that contracts entered into by a corporation, are void, unless they have the capacity to make them, by the terms of their charter. *Smith v. Ala. Life Insurance and Trust Co.* 4 Ala. Rep. 558; *Angell & Ames on Corp.* 200.

BETHEA & BECK, contra.

DARGAN, J.—The principle relied on by the counsel for the plaintiff, that corporations can do no acts, nor enter into any contracts, unless enabled to do so by their charters, need not be denied. Admitting this to be the law, we need only examine the charter of the Alabama Life Insurance and Trust Company, and we will see that by the terms of the charter, the company can lend money, and take a bill of exchange as

a security for its payment. By the 18th section of the charter, the trustees of said company have the power to invest the premiums and profits received by the company, and also the money received by them in trust, in government, or public stock of the United States, or of any State, or in the stock of any incorporated city, or in such real, or personal securities, as they may deem proper; and by an act amending the charter, passed in December, 1836, the company are authorized to invest and employ one half of their capital stock, in the same manner that they were authorized to employ their premiums, profits, and money received on trust.

Here is an express grant of power, to invest money in personal securities, within the meaning of which, bills of exchange are embraced. This grant of power is not limited or restricted by the charter to any particular species of personal security, to the exclusion of others.

We cannot review the action of the court below on an ancillary attachment, by a writ of error. *Mandamus* is the proper remedy to revise the action of the court below, either in quashing, or refusing to quash an ancillary attachment. See *Henderson v. Daily*, decided at this term.

The judgment of the county court is affirmed.

GOODGAME v. CLIFTON.

1. When a purchase made by a ward, of his former guardian, is attacked for fraud, the former may show, that he was advised in the State of Georgia, to come to Alabama, and secure the debt by a purchase of the slaves in controversy; and that he did come in a few days, and make the purchase, for the purpose of explaining the transaction, and the motives which prompted the purchase.
2. In construing a bill of exceptions, a particular expression, "as that there

was no evidence of any indebtedness," if repugnant to other statements in the bill, will be understood to mean, that there was no *positive* proof of indebtedness.

Error to the Circuit Court of Dallas. Before the Hon. John Bragg.

TRIAL of the right of property, in which the plaintiff in error was claimant. From a bill of exceptions, it appears, that the defendant in execution, was appointed guardian of the claimant, in the State of Georgia, in 1835, and that on 19th April, 1844, about two years after the claimant attained his majority, the slaves in question were sold by the former guardian, to the claimant, and a bill of sale executed for them, the consideration expressed in it being \$1,200. It was proved, that at the time of the sale, notes from the defendant in execution to the claimant were delivered up. The bill of exceptions proceeds to state, that there was evidence, that at the death of claimant's father, he was entitled to some property, but it was not shown that it came to the hands of the guardian, or whether there was any indebtedness from him to the claimant, on account of the guardianship, at the time of the sale. There was also testimony tending to show, that the sale was fraudulent.

The claimant introduced a witness, who testified, that early in the year 1844, he went to the State of Georgia, and there saw the claimant, and from what he had heard in Alabama, advised him to return with witness to Alabama, and endeavor to secure his debt against the defendant in execution, by a purchase of the slaves in controversy. That he did come to Alabama with the witness, for that purpose, and in a few days after reaching this state, made the purchase. On motion of the plaintiff, the court excluded this testimony from the jury, to which he excepted, and which is the matter now assigned as error.

EVANS, for the plaintiff in error.

1. The only error assigned is the exclusion of the testimony of the witness, Bates. The testimony offered was

relevant and competent, and highly important, as tending to show the *animus* of the claimant, in making the purchase. The precise point is decided in the case of *Goodgame v. Cole & Co.* at the December term, 1846, and which, with the authorities there cited, is referred to here to support the assignment.

CHAMBERLAYNE, for defendant in error.

The case at bar presents two questions for the consideration of this court; first, will the court reverse for an abstract error in law, by which the rights of the appellant could not have been prejudiced? Second, is this a case of that character?

The first point has been so frequently determined by this court, that it is only necessary to refer to them. See *Heath v. Patton*, 2 Stew. 38; 1 Ala. Rep. 517, 582; 5 Ib. 258. These, and other cases determined by this court, establish the principle, that the court will not reverse a case, unless appellant shows affirmatively, that there is error by which he has been prejudiced.

This brings us to the consideration of the second question presented by the record.

The case of *Goodgame v. Cole & Co.* at a former term of this court, is relied on by the counsel for the appellant as decisive of this case. On examination of that case it will be found that the facts of it are materially different from those in the case at bar; and that the law of that case is, so far as it is applicable to the case at bar, against a reversal. There is but one point common to the two cases, that is, the advice of the witness, Bates, which was excluded by the court.

CHILTON, J.—The isolated question presented by the record is, whether the claimant should have been permitted to prove by the witness, Bates, the advice which the witness gave him in the State of Georgia, viz: that he should return to Alabama with the witness, and endeavor to secure his indebtedness by a purchase of the slaves in controversy, from the defendant in the execution, and that he did return

with the witness, and in a few days thereafter made the purchase. The plaintiff in the execution insisted there was fraud in the purchase of the slaves, and the bill of exceptions informs us there was some proof conducing to show the fact. It then became necessary for the claimant to explain the transaction, and the motives which prompted the purchase. Was there a debt justly due him from his guardian, W. B. Goodgame, which the circumstances required him to secure? Was he advised of these circumstances, and did he act on the advice, and incur labor and expense in travelling from the State of Georgia to Alabama to arrange the business, which, according to our experience of men's conduct, do not ordinarily accord with the idea that the purchase was a collusive arrangement made to delay and defraud creditors? These, and the like inquiries were proper for the jury, and proof pertinent to them should not have been excluded. It is however insisted, that although the exclusion of the evidence offered to be made by the witness, Bates, may have been erroneous, still this court should not reverse, as the plaintiff in error has not been prejudiced, there being no proof, as is insisted, of consideration for the sale from W. B. Goodgame to the claimant. The facts set out in the bill of exceptions show, that the purchase was made by the claimant of his guardian, some two or three years after he had attained his majority. That the consideration was the extinguishment of certain notes then held by claimant against W. B. G., for twelve hundred dollars, which at the time of sale were delivered up. That the father of claimant, upon his death, left property, to a distributive share of which the claimant was entitled, and that pending the claimant's minority, the defendant in the execution became his guardian, viz: in the year 1835. The claimant, during his minority, was not entitled to receive the property left by his deceased father, and his guardian was the proper custodian of his effects. It was his duty to have reduced the ward's property to possession, and to have made it valuable. If he discharged his duty, he was liable to his ward for the property—if he failed to discharge it, by which the property was lost to the ward, he is equally liable for the consequences of such failure; so that we are not prepared to say, that the state-

ment in the bill of exceptions, "that there was *no evidence* of any indebtedness from the defendant in execution to the claimant, on account of said guardianship," is a legitimate sequence from the facts therein stated. But we construe the bill of exceptions to mean, there was no direct or positive testimony on the subject, as otherwise it would be repugnant.

We come then to the conclusion, that as the advice given by the witness, Bates, to the claimant, which induced him to come from the State of Georgia to Alabama, was competent to show the intention with which he came, and the motive which incited him to make the journey, and as its exclusion *may* have prejudiced the claimant, that the circuit court erred in not admitting it.

The view which we have taken as to the admissibility of the testimony of the witness, Bates, accords with the views expressed by this court, upon a case very analagous to the one at bar, and in which such proof was held admissible. See *Goodgame v. Cole & Co.* 12 Ala. 77.

Let the judgment be reversed and the cause remanded.

HATCHETT AND BROTHER V. GIBSON.

1. Pursuant to a contract, between the plaintiffs, and defendant, the latter deposited his cotton in the warehouse of the former, where it was destroyed by fire. The former, having brought an action against the latter, to recover for advances made on the deposit of the cotton—held, that if the defendant could recover damages from the plaintiffs, for the loss sustained in the destruction of the cotton, he could *recoup* such damages in this action.
2. Warehousemen, are bound to take reasonable, and common care, of any commodity entrusted to their charge; and if a loss occurs under circumstances which shows the want of such care, they are bound to make it good.
3. The object of the defendant being to *recoup* the damages, it was compo-

- tent for him, when sued for the advance, to prove the destruction of his cotton by fire, and the manner in which it occurred.
4. An objection to an entire deposition is not good, if part is sufficient. The objectionable part should be pointed out. The fact, that certain parts of the deposition were rejected, cannot make the refusal of the court to sustain the objection to a greater extent, an available error.
 5. The question being whether a warehouse was fire-proof, a witness stated he did not know what constituted a fire-proof warehouse, but that he knew what was regarded as such in Wetumpka, (where this house was situated,) and described the constituents of such a house, and that the plaintiffs' did not conform to it: Held, that although this answer was rejected by the court, it was allowable to refer to it, to determine whether another fact disclosed, was competent evidence.
 6. To determine whether a warehouse was fire-proof, a witness may describe his own warehouse, and show how the plaintiffs' was built.
 7. It was competent to prove in what manner the warehouse of T, which was fire-proof, was built, that it was not burned, and the special efforts by which it was saved; but a witness could not be asked, whether it was not "with great difficulty" the warehouse of T was saved.
 8. Proof of the rate of insurance, in the warehouse of the plaintiffs, and that of T, and the practice of planters and merchants in insuring in either warehouse, is inadmissible.
 9. Proof, that a witness introduced against the plaintiffs, had used expressions showing that he entertained ill feelings towards the plaintiffs, without proving what the expressions were, is inadmissible.
 10. To prove that the warehouse was to be fire-proof, the advertisement of the plaintiffs, and their receipts, as well as their declaration to the defendant, after he had begun to store his cotton, were admissible evidence.
 11. If it was a term of the contract, that the defendant's cotton was to be stored in a fire-proof warehouse, and the cotton was lost by the failure to provide such a house, the plaintiffs must make good the injury. The fact that the defendant was in the warehouse, after he had begun to deliver his cotton, can have no influence upon the contract.
 12. If, after a contract to store the defendant's cotton in a fire-proof warehouse, the latter dispensed with the completion of the warehouse, and consented that it need not be made fire-proof, such consent, if given, cannot be withdrawn after a loss has actually occurred, though there was no additional consideration for such consent.

Error to the Circuit Court of Talladega.

ASSUMPSIT, by the plaintiffs in error. Before the Hon. G. W. Stone.

THE action was brought to recover for advances of money

and merchandize, on cotton in store. The defence was, that the cotton was destroyed under such circumstances as authorized the defendant to *recoup* the damages.

The evidence tended to prove, that the plaintiffs agreed to store the defendant's cotton, upon which the advance was made, in a fire proof warehouse, and that 106 bales of the cotton were destroyed by fire, whilst in the warehouse.

The defendant read the deposition of one Thomas, a builder and architect, and among other questions, asked him—Do you know what constitutes a fire proof warehouse? if yea, state whether the house used by plaintiffs for storing cotton, was a fire proof warehouse? If you say it was not, state in what its deficiencies consisted. Was any part of it built as a fire proof warehouse? if yea, what part, if any, and what was not. What part of the building was most accessible to fire? Was any portion of it entirely unprotected, by slate or other non-combustible matter? What part, and to what extent, were you acquainted with the construction of the part of the house designated as the brick wall in your diagram? If yea, state what was its sufficiency for the purpose for which it was built. Did it answer the purpose of itself, or did it need supports or stays? If the latter, of what material were they, and upon being burned, what would be the consequence? &c.

He answered, "I do not know what constitutes a fire proof warehouse. No house, I would say, with any wood, or combustible materials in its walls, roof, or other part, is fire proof. Plaintiffs' warehouse was not fire proof." The witness then at length stated why it was not proof against fire.

In answer to another interrogatory, he stated, that he had a warehouse in Wetumpka, distant 120 feet from the plaintiffs', the construction of which he described. That it was exposed to the same fire, on two sides, which consumed the plaintiffs', and was saved by the timely exertion and diligence of six or eight persons, who extinguished the fire which fell on the cotton.

He also stated, I do not know, but believe, plaintiffs' house might have been saved, if equal to mine, and if ordinary diligence had been used. The buildings near plaintiffs' ware-

house were of such light and inflammable materials, that they would consume very rapidly, so as not to endanger greatly a good fire proof warehouse, when ordinary diligence was used.

The plaintiffs objected to the deposition for irrelevancy, and because it detailed the opinions of the witness, but the court overruled the objection, and the plaintiffs excepted.

The plaintiffs also offered to prove, that it was with great difficulty, that 'Thomas's warehouse was saved, but on the objection of the defendant, the court excluded the testimony, and the plaintiffs excepted. Plaintiffs further offered to prove, that insurance was effected on cotton in plaintiffs' warehouse before, and at the time of the fire. That a majority of the merchants, and many of the farmers, had cotton insured whilst in store in both warehouses. The proof was excluded, and plaintiffs excepted.

The plaintiffs offered to prove by one Lundee, that the witness, Thomas, entertained ill feelings towards plaintiffs at the time he gave his deposition. That he heard him use expressions about the plaintiffs, showing he entertained ill feelings towards them, but the witness could not remember the language, or the substance of it. On motion of the defendant it was rejected, and the plaintiffs excepted. The plaintiffs also moved to exclude all the proof relating to the fire, and the destruction of the cotton as irrelevant, which the court refused, and they excepted.

The court charged, that if the plaintiffs, by their representations, induced the defendant to store his cotton in their warehouse, under the belief that it was fireproof when it was not, and the cotton, whilst in their possession was destroyed by fire, because the house, or sheds, were not fire proof, the plaintiffs cannot recover for an advance upon the cotton, if the loss exceeded such advance, although he may have been in the warehouse after a part of the cotton was stored.

That if the cotton of the defendant could have been saved by ordinary diligence, they must find for the defendant, if the cotton was of more value than the advance.

That if, by representing that their warehouse, and sheds, were fire proof, the plaintiffs induced the defendant to store

his cotton with them, and it was afterwards destroyed by fire, in a warehouse not fire proof, the plaintiffs are estopped from saying that the defendant knew they were not fire proof, unless he knew it before he commenced storing his cotton.

That a warehouse man for hire, is as a bailee, held to stricter diligence when the articles deposited with him are of great, than if they were of small value; and would be held to stricter diligence when his house was stored with cotton, than if nothing was in it.

That if the cotton would have been destroyed if the warehouse had been fire proof, the defendant could not resist a recovery, unless the loss was caused by the carelessness of the plaintiffs.

The plaintiffs excepted to these charges, and assign for error all the matters of law arising upon the bill of exceptions.

HOPKINS and MORGAN, for plaintiffs in error.

1. The question is asked Thomas, (a witness for defendant,) by defendant, "Do you know what constitutes a fire proof warehouse?" He answered, "I do not; no house, I would say, with any wood, or combustible material in it is fire proof. Plaintiffs' house for storing cotton was not fire proof."

2. Thomas was allowed to prove the construction of his own house, and that it was not burned, and that plaintiffs' house was not built of the same material, and in the same manner with his house.

3. Thomas did not see the wall of plaintiffs' house fall, but was allowed, after stating his reasons, to say, "hence I conclude, that if the props were removed, the wall would fall, and the props being removed the walls did fall."

4. To the 9th cross interrogatory by plaintiffs, "Was Hatchett's house equal or inferior to the one occupied by yourself at that time—if it had been as good, could it have been saved by ordinary diligence?" The answer is, "I do not know, but believe plaintiffs' house might have been saved if equal to mine, if ordinary diligence had been used. The buildings near by plaintiffs' house were of such inflammable material that they would consume rapidly, so as not to endanger as

good a fire proof warehouse as mine, or Mr. Cromelin's house where ordinary diligence was used.

"I understand by ordinary diligence, such exertions as one would put forth to save life, limb, or property, when afraid of danger." The 9th cross interrogatory was only propounded, to be used in the event that a similar interrogatory propounded by defendant should be answered. *Olds v. Powell*, 7 Ala. Rep. 652; *Jefferson Ins. Co. v. Cothnel*, 7 Wend. 72, 77-8.

5. The court refused to allow plaintiffs, on the cross examination of defendant's witnesses, to ask them, "whether it was not with great difficulty said Thomas's house was saved."

6. The court refused to allow plaintiffs to prove by Mr. Lundie, that he had heard Thomas use expressions, when talking about plaintiffs, showing that he entertained ill feelings towards plaintiffs, Mr. Lundie not being able to state the words used by Thomas. 1 Johns. R. 99, 103; *McKee v. Nelson*, 4 Cow. R. 355.

7. The seventeen cotton receipts presented each a distinct substantive contract, on which Gibson could have brought his separate actions, and presented as many different issues as there were cotton receipts. A *recoupment* for a part of the receipts would not have barred an action on the balance of the receipts. *Bartholomew v. Pierce*, 3 Hill, 171, 175.—The contract for the storage of the cotton was distinct from the contract for advances, although it related to the same subject matter.

8. The sixth charge given by the court affirmed the doctrine, that it is no ratification of the act of the warehouseman in storing the cotton in a house not fire proof, if the consignee knew the condition of the house, and continued to store cotton in it, unless he knew the condition of the house before he commenced storing any part of his cotton. Story on Agency, 248-50.

9. Gibson was not misled by the advertisement, or cotton receipts. He sent most of his cotton to the warehouse after he knew its condition. He made no objection to that condition when he first learned it, but some time afterwards informed the plaintiffs he thought the shed ought to be cover-

ed, which was done immediately afterwards. The plaintiffs were guilty of no fraud. They informed the defendant, about the 24th of October, that they intended to do nothing more that season, on the warehouse, except to cover the shed. The defendant sent most of his cotton there after that communication. 7 Wend. Rep. 71; 3 Ala. Rep. 660.

L. E. PARSONS, for defendant.

1. This is an action of assumpsit, for money and merchandise advanced by plaintiffs to defendant, on cotton in store. Any defence which shows the plaintiff is not in justice entitled to recover the advance, is proper in this action.

The cotton was in fact a pledge. Its destruction or loss for the want of ordinary diligence on the part of plaintiffs is always a defence to an action for the money advanced.

The defendant will be permitted to *recoup* his damages where the liability arises out of the same contract. *Crad-dock v. Stewart*, 6 Ala. 82; *Peden v. Moore*, 1 Stew. & P. 71; *Batterman v. Pierce*, 3 Hill, 174; *Green v. Linton*, 7 Porter, 133; *Hill v. Bishop*, 2 Ala. 320.

Thomas's deposition was objected to for irrelevancy. His opinions were excluded, although he was a master builder by trade. His evidence shows, that a warehouse built by him, in the form usually denominated fire proof, was not burned, although attacked on two sides at once, by the fire.

Any thing which would show the want of ordinary diligence on the part of plaintiffs, in keeping the cotton, was proper evidence. And it is insisted that all the facts and circumstances offered in evidence do show, or tend to show it.

There was no charge asked, or given, on the fact set out in the bill of exceptions, that the defendant sent word to plaintiffs he was satisfied with the manner in which the cotton was kept. No point arises on it in this court.

The charges of the court put this case on the proper ground.

COLLIER, C. J.—In addition to what is stated in most of the receipts which were given upon the delivery of the cot-

ton at the warehouse, in respect to the plaintiffs' lien for advances, the bill of exceptions affirms that proof was adduced by the defendant, tending to show that the account upon which he is sued, was for advances on the faith of his cotton in the plaintiffs' possession. The first question which arises upon this branch of the case is, whether the defendant can resist a recovery by proving that the plaintiffs did not take care of his cotton according to their contract, and that it was negligently destroyed by fire. It is not pretended to rest this defence upon the law of set-off, as regulated by statute, but to bring it within the influence of the doctrine of *recoupment*, as extended by modern decisions. This is applied "for the purpose of reducing the plaintiffs' damages, for the reason that he himself has not complied with the cross obligations arising under the same contract. Thus, in an action to recover compensation for services rendered, the employer is entitled to show by way of *recoupment* of damages, loss sustained by him through the negligence of the person employed," &c. Barbour on Set-off, 26. Mr. Sedgwick, in his treatise on the measure of damages, p. 461, says that while *recoupment* "originally, merely implied a deduction from the plaintiff's demand, arising from payment in whole or in part, or from recovery, or some analogous fact, it is now understood to embrace counter claims of the defendant, and to be, in short, a kind of irregular and unliquidated set-off, which has crept in notwithstanding the rigorous terms of the statute." Where the plaintiff brought an action to recover a stipulated sum for work done as a carpenter, it was held that the defendant might show that the materials were defective, and the work done in an improper and insufficient manner. Basten v. Butter, 7 East's Rep. 479; Farnsworth v. Garrard, 1 Camp. Rep. 38; Fisher v. Samuda, et al. Id. 190; Peden v. Moore, 1 Stewt. & P. Rep. 70; Gleason & Viele v. Clark's adm'r, 9 Cow. Rep. 57; Spalding v. Vandercook, 2 Wend. Rep. 431; McAlister v. Reab, 4 Wend. Rep. 483, and 8 Id. 109. In Still v. Hall, 29 Wend. Rep. 51, which was an action of assumpsit by the master of a sloop for his wages, it was held competent for the owners to *recoup* the damages sustained by them in consequence of the plaintiff's negligence in laying the sloop in such a way that she was run

into and sunk. See also *Blanchard v. Ely*, 21 Wend. Rep. 342. *Recoup*, it is said, "is synonymous with defalc or discount. It is now uniformly applied where a man brings an action for a breach of contract between himself and the defendant; and the latter can show that some stipulation in the same contract is made by the plaintiff, which he has violated, the defendant may, if he choose, instead of suing in his turn, *recoup* his damages arising from the breach committed by the plaintiff, whether liquidated or not." *Ives v. Van Eps*, 22 Wend. Rep. 155. So, if in an action for use and occupation, the defendant is entitled to damages for not repairing the tenement, they may be set up by way of reducing or extinguishing the rent. *Westlake v. De Graw*, 25 Wend. Rep. 669. See *Etheridge v. Osborn*, 12 Wend. Rep. 529; *Tone v. Brace*, 8 Paige's Rep. 597. *Batterman v. Pierce*, 3 Hill's Rep. 171, was an action on a promissory note, given for wood which had been destroyed by the payee's burning a piece of fallow ground adjoining the lot where the wood lay, and against the consequences of which he had undertaken to indemnify the defendants when the note was given. The question was, whether this evidence was a defence to the action; and the court said, "when the demands of both parties spring out of the same contract or transaction, the defendant may *recoup*, although the damages on both sides are unliquidated; but he can only *set-off* when the demands of both parties are liquidated, or capable of being ascertained by calculation." Upon an objection that the damages arose under an agreement to indemnify against fire, which was collateral to the contract of sale, the court admitted "that there could be no *recoupment* by setting up the breach of an independent contract on the part of the plaintiff," but held that the sale of the wood, and the stipulation in respect to the fire, were embraced in the same contract. See *Taggard v. Curtenius*, 15 Wend. Rep. 155; *Willoughby v. Comstock*, 3 Hill's Rep. 389; *Button v. Turner*, 6 N. Hamp. Rep. 497; *Crowninshield v. Robinson*, 1 Mason's Rep. 93; *Miller v. Smith*, Id. 437; *Dodge v. Tileston*, 12 Pick. Rep. 328; *Harrington v. Stratton*, 22 Pick. Rep. 510; *Perley v. Balch*, 23 Pick. Rep. 284; *McAlpin v. Lee*, 12 Conn. Rep. 129; *Mondel v. Steel*, 8 Mees. & Wels. Rep. 858. Where the plain-

tiff accepted employment in a manufactory, with a knowledge of the regulation adopted by the company, requiring all persons employed by the company to give four weeks' notice of an intention to quit their service, and left their service without giving such notice; in a suit for his wages, the plaintiff was held liable for all damages caused by not giving the notice, and that in such suit they should be deducted from his wages. *Hunt v. Otis Company*, 4 Metc. Rep. 464. In trover for the recovery of goods, it has been decided that the defendant, who had a lien on them for freight, is entitled to *recoup* it. *Everett v. Saltus*, 20 Wend. Rep. 267. So, where the defendant agreed to furnish a vessel with certain freight, but failing to comply with his contract, third persons offered to make up the deficiency: *Held*, that the master was bound to accept the offer of such persons, and that the defendant could claim a deduction of the freight that they would have paid. *Hecsher v. McCrea*, 24 Wend. Rep. 267. See *Gibson v. Gibson*, 15 Mass. Rep. 106; *Austin v. Foster*, 9 Pick. Rep. 341.

Warehousemen, it is said, are bound to take reasonable and common care of any commodity entrusted to their charge, and if a loss occurs under circumstances which show the want of such care, they are bound to make it good. *Story on Bailm.* 289, *et seq.* The same degree of diligence in respect to the preservation of a pawn, is required of a pawnee. *Id.* 222, *et seq.*

The contract between the plaintiffs and defendant was, that the latter should deposit his cotton in the warehouse of the former, that the plaintiffs should advance on it, retaining a *lien* for their reimbursement. To this contract the law tacitly annexed the stipulation that the plaintiffs would take ordinary care in its preservation, and if they did not, would pay the defendant for any loss resulting from neglect. These several stipulations, although they may embrace distinct duties and obligations, constitute one entire contract. This is sufficiently shown by their mere statement, and the breach of any undertaking on the part of the plaintiffs, by which the defendant sustained damage, would furnish a proper ground of *recoupment* in the present action, which is brought to recover back the advances made by the warehousemen. It is

needless to amplify this point; for many of the authorities cited, are direct and explicit, and fully support the conclusion we have expressed. This being the law, it was clearly competent to allow the defendant to prove the destruction of his cotton by fire, and the manner in which it occurred.

What has been said, will suffice to show that the objection to the deposition of Thomas on the ground of irrelevancy, was properly overruled. As for the general objection to the opinions of the witness, it might have been overruled *in toto*, without looking into the deposition to see if it was objectionable for that cause, upon the ground that the plaintiffs did not specify the particular portions of the deposition they desired the court to exclude. And the fact that certain parts of the deposition were rejected, cannot make the refusal of the court to sustain the objection to a greater extent an available error; for the reason we have stated, that the plaintiffs failed to particularize.

But conceding that the objections which are now pointed out to the deposition of Thomas had been specified at the trial, and we are inclined to the opinion that they should have been overruled. We will consider them severally. The witness, it is true, states that he does not know what constitutes a "fire proof warehouse," that is, a building exempt from liability to fire; but he knows what is regarded as such in Wetumpka, and describes it with particularity, and that the plaintiffs' warehouse did not conform to the description. It is insisted that the last fact stated was inadmissible, because he denied in general terms that he did not know what constituted a fire proof house, and what he said in respect to the mode in which such a house was built in Wetumpka, was rejected by the circuit court. The question was whether the plaintiffs' house was fire proof according to the understanding of the term generally, or at Wetumpka; and notwithstanding a part of the answer was adjudged inadmissible, yet it was allowable to refer to it to determine whether another fact disclosed, was competent evidence. Looking, then, to the part of the answer which was excluded, we are satisfied that what was said as to the nonconformity of the plaintiffs' warehouse to the Wetumpka standard, was properly admitted.

We can conceive of no objection to the description given

by the witness of his own warehouse, and to the statement that the plaintiffs' house was not built in the same style—these are facts merely, and not opinions.

In respect to the answers to the sixth and ninth questions propounded by the plaintiffs on cross-examination, they may perhaps state a matter of opinion, which if it had been elicited by the defendant would be incompetent evidence; but the frame of the questions is such as not only to call for a special narration of facts—the witness is also invited to express his conclusions upon them.

The court rightly admitted the defendant to show in what manner Thomas's warehouse (which was fire proof) was built, that it was not burnt, and the special efforts by which it was saved. But a witness who testified to these facts, could not be asked, on cross-examination, *whether it was not with great difficulty that Thomas's house was saved*; the witness had furnished the jury with the *data* on which they might found a conclusion, and it was not permissible for him to express his *opinion*.

The testimony offered by the plaintiffs in respect to the relative rates of insurance on cotton stored in their warehouse and that of Thomas, as well as the practice of planters and merchants as to insuring cotton stored in either warehouse, was properly excluded. It is difficult to perceive its pertinency, as the defendant was not bound to insure, but might protect himself by selecting the house which he deemed most secure against fire or other casualty. Conceding, however, that it would have been competent evidence, if offered by the plaintiffs in making out their case, or if the defendant had adduced proof to which it was a reply, it is enough to say that it was offered by way of rebutting the defence, and to have made it admissible as a matter of right, it should have been a replication to facts proved on the part of the plaintiffs, and not the introduction of new matter. *Ivey v. Phifer*, at this term.

It may be conceded that it is competent for a party to discredit or impair the testimony of his adversary's witnesses, by proof of particular acts of hostility of those witnesses towards him, or by remarks indicative of a revengeful spirit. *Rixey v. Bayse*, 5 Leigh's Rep. 330; *Harris v. Tippet*, 2

Camp. Rep. 637; *Rex v. Rudge*, 2 Peake's N. P. Cas. 232; *Atwood v. Welton*, 7 Conn. R. 66. The fact proposed to be proved by the witness Lundie, was, that he had heard Thomas, previous to his examination, use expressions about the plaintiffs, showing that he entertained ill feelings towards them; but witness did not remember the language employed, or the substance of it. To have authorized the admission of such testimony to discredit another witness, the language used, or at least the substance of it, should be proved, that the court may determine its competency, and the jury the effect to which it is entitled.

It was allowable to fortify the inference from the plaintiffs' advertisement, and the form of the receipts they gave for cotton, that they stipulated with the defendant to store his cotton in a fire proof warehouse. Their declaration to Bradford, after they began to receive cotton, in the fall of 1844, that they intended to make their warehouse fire proof, was admissible for the purpose stated; and perhaps also, it may tend to show that the defendant did not dispense with that term of the contract, or that the plaintiffs did not inform him, after he began to deliver his cotton, they did not intend to complete their warehouse that season, as they had agreed to do.

We are now brought to consider the charges to the jury. 1. The first affirms that if the plaintiffs induced the defendant to send them his cotton, under an assurance that the warehouse in which it was to be stored should be made fire proof by the first of October, 1844, and failed to fulfil their engagement, in consequence whereof the cotton was destroyed by fire, then the plaintiffs are not entitled to recover for advances made on the cotton, if the cotton was worth more than the advances; and this although the defendant may have been in the warehouse after a considerable part of his crop had been deposited there. This charge, we think, is unobjectionable. If it was a term of the plaintiffs' contract, that their warehouse should be fire proof, and the defendant's cotton was lost by the plaintiffs' failure to provide such a house, then they should make good the damage consequent upon the breach of their undertaking. The mere fact that the defendant was in the warehouse after he had began to

deliver his cotton, can have no influence upon the contract ; for he may not have discovered it was not fire proof, and there was no obligation upon him to ascertain that it was such as the plaintiffs stipulated it should be.

2. If the plaintiffs could have saved the defendant's cotton by *ordinary diligence*, it was incumbent on them to do so, and if it was lost by their neglect, the defendant is entitled to *recoup* the damages in this action. The general assertion, that a party who induces another to act upon the faith of his false representation, is liable to make good any injury resulting from it, it must be admitted is not universally true, but as applicable to the case before us, we think it is not erroneous. If the plaintiffs sought the defendant's patronage, and assured him that if he would store his cotton with them, they would deposit it in a fire-proof warehouse and confiding in the plaintiffs' promise, the defendant sent them his cotton, this would amount to a contract that the cotton should be thus kept. It would be something more than a mere representation, which, in order to impose a legal liability, must not only be false but fraudulent also. See *Lyon v. Elliott*, 3 Ala. Rep. 654, 660 ; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. Rep. 72.

The latter part of this charge is not clearly stated in the bill of exceptions, but its meaning is obvious enough.—When expressed in plain and intelligible terms it affirms that in order to warrant the inference that the defendant dispensed with that part of the plaintiffs' undertaking which required them to store his cotton in a fire-proof warehouse, it should appear the defendant knew the house was not of that description before he delivered any part of the cotton. To ascertain whether an instruction is proper, it is always allowable to look to the evidence. Now in the present case it was proved, that the defendant was in the warehouse after the first of October, when he had delivered a considerable quantity of his crop, and to a remark by one of the plaintiffs, that he did not intend to have any more work done on the warehouse, during the business season of '44-5, he made no reply ; but not long afterwards directed his teamster to tell the plaintiffs that the shed should be covered, which was completed in a short time thereafter. The branch

of the charge we are considering, in effect excluded this evidence from the jury, as part of the cotton was delivered before the facts related, actually occurred; and in this we think the circuit court erred. It was certainly competent for the defendant to relieve the plaintiffs from the performance of any term of their contract—he might by his acts, as well as by words, assent to the storing of his cotton in a house of material and structure different from what the plaintiffs' contract contemplated; and this as well while the cotton was being delivered, as before any part of it was taken to the warehouse. We do not undertake to say that the facts establish such a waiver, but they should not have been withdrawn from the consideration of the jury, or their inquiries in respect to them foreclosed. Chitty on Con. 4 Am. ed. 90, 602, 603, and notes on each of these pages; Cox v. Bennet, 1 Greenl. Rep. 167; Shaw v. Lewistown Turnp. Co. 2 Pennsylv. Rep. 454; Baldwin v. Farnsworth, 1 Fairf. Rep. 414; Gage v. Coombs, 7 Greenl. Rep. 394; Wyer v. Merrill, Id. 342. See also Hayden v. Madison, 7 Greenl. Rep. 76; Abbott v. Hermon, Id. 121; Fleming v. Gilbert, 3 Johns. Rep. 520. The contract was certainly intended for the benefit of each party, and it was competent for them, by mutual assent, to dissolve it either in whole or in part. The defendant may have dispensed with the completion of the warehouse, and consented that it need not be made fire proof without any additional consideration; and if such consent has been given, it cannot be withdrawn after a loss has actually occurred.

3. This charge perhaps cannot be defended to the full extent. It may be admitted that the degree of care required of a bailee is proportioned to the nature, intrinsic value, &c. of the article intrusted to his keeping. A man will not be expected to take the same care of a bag of oats, as of a bag of dollars; of a bale of cotton, as of a box of diamonds or other jewelry; of a load of wood, as of a box of rare paintings; of a rude block of marble, as of an exquisite sculptured statue. The bailee therefore ought to proportion his care, to the injury or loss which is likely to be sustained by any improvidence on his part, and to the watchfulness necessary to the preservation of the article. Hence, as dollars, jewelry and

fine paintings, present a greater temptation to the thief, and are more easily secreted, than oats, cotton or wood, or a finished statue is more liable to injury than rough marble, a bailee should bestow more diligence in their safe keeping. But the dictates of common sense would seem to require that the warehouseman who receives cotton on deposit for a certain compensation, should be equally careful in preserving the crop of one who makes but a single bale, as that of him who makes a hundred. In respect to each of such bailors, he is bound to ordinary diligence. Story on Bailm. § 15; Tracy v. Wood, 3 Mason's Rep. 132; Anderson v. Foreman, Wright's Rep. 598; Bland v. Wormack, 2 Murph. Rep. 373; Batson v. Donovan, 4 B. & Ald. Rep. 21, et post. Whether the plaintiffs could have been prejudiced by this instruction to the jury, we will not stop to inquire; we notice it, merely to state the law as a guide in the ulterior progress of the cause.

4. This charge begins by stating a truism, but the principle, if it be one, cannot be easily applied. The remaining part of it is in effect considered and disposed of in what has been said upon other parts of the case. For the error in the second charge, the judgment is reversed, and the cause remanded.

CHILTON, J., not sitting.

COLEMAN v. THE STATE.

1. A steamboat, employed in carrying passengers and freight, is a public place, within the meaning of the statute against unlawful gaming.

Before the Hon. S. Chapman.

THE plaintiff in error was indicted, in the circuit court of Pickens county, for playing a game at cards. The indictment contains several counts—one for playing cards at a public place, another for playing cards at a place where spiritous liquors were retailed. There were other counts, not necessary to be noticed. On the trial of the cause, a bill of exceptions was taken to the charge of the court, which presents the following facts: The playing took place on a steamboat, on the Tombeckbee river, in the county of Pickens. The boat plied between Mobile and Pickensville, carrying freight and passengers. That spiritous liquors were retailed at the bar of the boat. That at the time of the playing there were passengers on board, and that spiritous liquors were retailed during the time of playing. The counsel of the plaintiff in error requested the court to charge the jury, that the playing did not take place at a public place, or at a place where spiritous liquors were retailed, within the meaning of the act prohibiting gaming, which the court refused, and charged the contrary to be the law. The plaintiff was convicted, and judgment thereon being rendered, a writ of error is prosecuted to this court.

This cause was submitted without argument, by HUNTINGTON, for plaintiff in error.

DARGAN, J.—The language of the statute on which this indictment is founded, is, “if any person shall play at any tavern, or inn, or storehouse for retailing spiritous liquors, or house or place where spiritous liquors are retailed, or given away, or any public house or highway, or at any other public place, or at any outhouse where people resort, at any game or games, with cards, or dice, &c. such person, so offending, shall on conviction be fined, &c.

The object of this statute is, to prevent the vice of gaming at the places specified in it, in order to suppress its evil influence upon the public morals; and the only question is, was the gaming at a place prohibited by the statute? A steamboat employed in carrying passengers and freight, is certainly a public place; and if spiritous liquors are retailed at the bar of the boat, it would be nonsense to say it was not a place

where spiritous liquors are retailed. The playing in this case, was at a place designed to be prohibited, and by express words is prohibited by the statute. The charge of the court was therefore correct, and the judgment is affirmed.

POLLARD v. TAYLOR.

1. A creditor, who obtains a judgment, after a sale of the debtor's land under judgment and execution against him, and before the expiration of the time allowed by the statute for redemption, may redeem the land from the first purchaser.

Appeal from the Court of Chancery of Pike. The Hon. J. W. Lesesne, Chancellor.

On the 10th November, 1845, Thomas B. Taylor, became the accommodation acceptor for George C. Ball, upon a bill of exchange, at sixty days' sight, which being protested, Taylor was sued, and a judgment rendered against him in the fall of 1846. In May, 1847, he paid the judgment, and at the May term, 1847, of the circuit court of Montgomery, obtained a judgment against Ball for the money so paid.

In September, 1846, certain lands of Ball were sold under execution against him, and purchased by Charles T. Pollard, and in August, 1847, Taylor offered to redeem the lands under the statute, as a judgment creditor of Ball, which Pollard refusing to permit, he exhibited his bill in chancery to compel a redemption. The defendant demurred to the bill, and the chancellor at the hearing, held, that the complainant was such a creditor, as could redeem under the statute, and decreed accordingly. This is now assigned for error.

ELMORE & YANCEY, for plaintiff in error.

Pollard v. Taylor.

1. Under the "act to prevent the sacrifice of real estate," the lands of the debtor, when sold under execution, are sequestered for the benefit of judgment creditors. Their rights must vest at the time the sequestration takes place, and must be determined by their character at that time. Clay's Dig. 502, § 2, 3; Br. Bank of Mobile v. Furniss, 12 Ala. R. 367. This view is sustained—1. On grounds of public policy, and by analogy to the insolvent and bankrupt laws. A debt accruing after the insolvency or bankruptcy, cannot share in the distribution of the effects; and so of a creditor's bill. Owen on Bankruptcy, 39. 2. And the bankrupt act of the United States sustains it also, as sureties, &c. are expressly included in the fifth section, and without this they would have been excluded. Owen on Bank. Appendix, 55. 3. The cases from New York are not adverse to this proposition, but in fact support it. The principles there decided on their redemption act, are—1. No one can redeem unless his judgment is a lien on the lands of the debtor. Erwin v. Schriver, 19 Johns. 379; Bissell v. Payne, 20 Ib. 3; Van Rensselaer v. Sheriff of Albany, 1 Cowen, 501. 2. There is a lien on the lands when the judgment is obtained within the time of redemption, because "the estate of the debtor is not changed by the sale and certificate. The purchaser acquires no title till he receives a deed." See cases *supra*, and opinion of Savage, C. J., Van Rens. v. Sheriff of Albany, 1 Cowen, 501. But in this State the purchaser takes his deed at the sale, and acquires the title at once. Nothing remains in the debtor but an equity; and this is not the subject of a lien under a judgment at law. Elmore & Willis v. Harris, et al. present term.

2. But Taylor was not even a general creditor when the sale took place, and by no just rules of construction, can his case be brought within the statute.

BELSER & N. HARRIS, contra.

1. The statute is a remedial one, intended for the benefit of the debtor, by preventing a sacrifice of his real property. It should be so construed, as to suppress the mischief and advance the remedy. Van Rensselaer v. Sheriff of Albany, 1 Cowen. 501: Ex parte Bank of Monroe, 7 Hill. 177: Jones

v. Planters' Bank, 5 Hump. 619; Iverson v. Shorter, et al. 9 Ala. 715.

2. It is broad enough in its terms, to embrace cases, in which the debt originated, or the liability of the judgment creditor on the bill of exchange, was fixed after the sale, provided the judgment be obtained, and the offer to redeem be made within two years from the date of the sale. Clay's Dig. 502, § 2; Van Rensselaer v. Sheriff, &c. 1 Cowen, 443; Van Rensselaer v. Sheriff, &c. 1 Cowen, 501; Bank v. Furniss, January Term, 1847; Ex parte Carmichael, 5 Cowen, 17; see also, 3d and 4th sections of the act of 1842.

3. According to the statute, and the authorities by which it is to be construed, the chancellor properly allowed Taylor to redeem. The intention of the legislature must govern, although it may seem contrary to the letter of the act; but in this case, no violence is done to the words of the act by such a construction, and it is in unison with the legislative intent. Jackson v. Collins, 3 Cowen, 89; Wilkinson v. Leland, 2 Peters, 627; Reddick v. Governor, 1 Mis. 147. The intention was to establish an action for the benefit of the debtor.

4. The cases in bankruptcy, in which it is stated, that the creditor's debt must be subsisting, when the act of bankruptcy is committed, bear no analogy to the present. The words of the law in the two cases are different. See Moss v. Smith, 1 Campbell, 489; Ex parte Christy, 3 Howard, 292; 5 U. S. Stat. at Large, 443.

5. There is no force in the idea, that the title to the real estate, sold under execution, becomes vested in the purchaser, by the sheriff's deed. If it vests at all, by the instrument, it vests subject to the right of redemption, contemplated in the act of 1842, which supersedes the act of 1812, in this particular. Clay's Dig. 205, § 17; Ibid. 502, § 2.

6. The bill of exchange, on which was Taylor's name, was a liability before the execution sale, that might ripen into a debt in his favor against Ball, and by analogy to the bankrupt decisions, Taylor would be protected in his offer to redeem under the circumstances. McCarty v. Barron, Strange, 849; 1 Step. N. P. 588. The court are referred to

the decree of the chancellor, for some good reasons, in support of his opinion.

CHILTON, J.—The express object and intention of the legislature in enacting the statute, which we are called on to construe, was “to prevent the sacrifice of real estate,” and it is our duty to give such judicial construction to the act as will carry out this intention. The statute is remedial, and must receive a liberal interpretation. It provides, “when-ever it shall hereafter happen that any interest in land shall be sold at any execution sale, and the individual whose interest is so sold, shall have other *bona fide* creditors, they may, at any time within two years after such sale, redeem such interest as may have been sold from the purchaser thereof,” &c.

The plaintiff in error purchased the land in controversy in 1846, and the defendant did not recover his judgment against Ball, until May, 1847, but tendered the money and demanded a redemption of the premises before the expiration of the two years allowed by the statute.

The only question arising out of the record is this: Can one who obtains a judgment after a sale of the debtor's land, under judgment and execution against him, and before the expiration of the time allowed by the statute of redemption, redeem the land from the purchaser of the judgment? Or, is the right to redeem confined to persons who are *bona fide* creditors of the debtor *at the time of the sale of his land*? Would the former construction favor or defeat the intention of the legislature in enacting the law? This court, in the case of *Thomason v. Scales*, 12 Ala. Rep. 309, held, that none but a judgment creditor could redeem. Now it is most manifest that it was intended by the act to put the land of the debtor to auction among his creditors, and, that by a succession of bidders, the land in the hands of the last purchaser might bring its reasonable value. The effect of the statute would doubtless be to make the land sell for a less price at the first sale. The person who purchases does so with a knowledge that it is liable to be redeemed, and the creditor is not particular to attend the sale, or bid on the land, knowing the right is reserved to him for two years to come in and pay up the money so bid, with *ten per centum per annum*, and

by crediting ten per cent. upon the amount of his demand, to make a redemption. If no persons but such as have judgments at the time of the sale could redeem, the whole scope and design of the act would be defeated, and usually the first judgment creditor would take the estate, perhaps at a mere nominal price. The creditor might collude with the debtor, and confess a judgment upon an honest demand, the effect of which would be, when a sale was made under it before the rendition of other judgments, forever to bar the right of redemption of other creditors. But in most cases the debtor himself, as well as his creditors, would be greatly prejudiced. The law, instead of encouraging a fair process of bidding, by which the creditors would in many cases receive the full amount of their demands, and the debtor be relieved from his embarrassments, would invite a scramble among the creditors as to which should be able to sell under a judgment, before other judgments should be obtained; and in many cases, of which the one before us furnishes an example, honest creditors would be entirely deprived of the benefit of the law, by reason of their demands not being due, or in a condition which would not authorize them to obtain a judgment before a sale of the land. But upon which, they may obtain judgment before the expiration of the two years allowed by the statute for redeeming. The opinion of this court, as expressed by the learned judge in the case of *Thomason v. Scales*, *supra*, contains a very just as well as correct exposition of the object and design of this statute, and we think it quite clear that it furnishes no warrant for the exclusion of any creditor of the party whose land is sold, who reduces his demand to judgment before the expiration of two years after the sale.

It is insisted by the counsel for the plaintiff in error, that in this State, as in the State of New York, there must be a lien on the land in favor of the party who offers to redeem, and that inasmuch as by our statute, the sheriff executes a conveyance, the title, *eo instanti*, vests in the purchaser, and nothing remaining in the debtor upon which a judgment subsequently rendered could attach a lien, the junior judgment creditor has no right to redeem; and the court is referred to 19 Johns. Rep. 379; 20 *Ibid.* 3; and 1 Cow. 501. By the

statute of New York, it is provided the title shall not pass to the purchaser until after the expiration of fifteen months from the time of such sale. Rev. Stat. vol. 2, p. 373, § 61. It is also further provided by that statute, that any creditor of the person against whom such execution issued having in his own name, or as assignee, representative, trustee or otherwise, a decree in chancery or judgment at law, *rendered at any time before the expiration of fifteen months from the time of such sale, and which shall be a lien and charge upon the premises sold*, may redeem," &c. See Rev. Stat. vol. 2, p. 371, § 51. Under these statutory provisions, it was held, in the case of Van Rensselaer v. 'The Sheriff of Albany, 1 Cow. 501, that it is enough to entitle the judgment creditor to redeem, that his judgment is a lien at the time he comes to redeem, and that it need not be a lien at the time of the sale. 'That as the sale under the statute does not divest the title of the debtor until after the expiration of the fifteen months allowed for redemption, have expired, a judgment rendered at any time within that period is a *lien*. 'The court say, that as the intention of the legislature was—1. 'To relieve the debtor by preventing a sacrifice of his real estate by sheriff's sale. 2. 'To enable creditors other than the plaintiff, after a sale on execution, to satisfy their debts by redeeming, where the property has been sold below its value. 'The statute being, as we have said, remedial, they so construe it as to suppress the evil and advance the remedy.

The cases of Bissell v. Payne, 20 Johns. Rep. 3, and Erwin v. Scrivner, 19 Ib. 379, but affirm the same doctrine. We think these cases persuasive to show the construction contended for by the counsel for the plaintiff in error, would thwart the intention of the legislature. If it be true that a redemption could only be made by a creditor in whose favor a lien had attached under *our* statute, then it follows, that as a sale under the older judgment consummated by the sheriff's deed required to be made, divests all liens of the junior judgments, the right to redeem would be lost even as to those who at the time of the sale were judgment creditors. But our statute, unlike that of New York, does not proceed upon the ground of *lien*. It is true, the creditor must have reduced his demand to judgment before he can redeem, but

this is required, not that a lien may be created upon the land, but that the purchaser may be furnished with the evidence of a *bona fide* demand in favor of the creditor demanding redemption. The title upon the purchase at sheriff's sale vests in the purchaser, but he takes it charged with the condition which the statute imposes, that any *bona fide* creditor of the debtor may within two years from the date of his purchase, redeem the land by paying as the act provides, and crediting his demand with a sum not less than ten per cent. upon the amount. The intention of the legislature, too plainly discoverable in this act to be easily misapprehended, we think will be followed by the above construction, and this is the true rule, even though such construction seems to oppose the letter of the statute. In this case, however, we think it is not opposed, either by the letter or spirit of the act.

It is further insisted, that as the liability of Ball, the debtor, to defendant in error, at the time of the sale, was but contingent, (he being an accommodation acceptor,) the defendant cannot be regarded as a creditor at the time, and that by analogy to the insolvent and bankrupt laws, he should be excluded from participating in the effects of the debtor. Now if we allow the analogy to hold good, it is evident the *holder* of the bill would have been entitled under the insolvent and bankrupt acts to share in the effects *pro rata*, and the accommodation acceptor would, to the extent of such payment, have been relieved from liability. If the acceptor in such cases as respects the drawer for whose accommodation he accepts, stands in equity in the character of a security, when he pays the debt, may he not be subrogated to the right which the original holder had to redeem? Be this as it may, it is quite clear to our mind, from the considerations above referred to, that if the acceptor, in cases like the present, pays the bill, and reduces his demand to judgment against the drawer before the expiration of the two years, he has the right to redeem, notwithstanding he may have made the payment after the sale. The bankrupt and insolvent laws differ, both in their phrascology and objects, from the act under consideration, and each must be construed so as to suppress the mischief intended to be remedied. Our conclusion is, the decree of the chancellor must be affirmed.

CARRINGTON & CO. v. MANNING'S HEIRS.

1. A testator by his will directed as follows: "It is my will, that the interest which I have in a house and lot, in the town of Huntsville, with all my lots lying in the towns of Triana, and Florence, be sold, and the proceeds applied to the payment of legacies hereafter bequeathed, and the discharge of my debts. I hereby direct, and require my executors, hereinafter named, to keep my estate in the county of Marengo together, until all my debts and legacies are paid off and discharged, and out of the proceeds of my said estate in Marengo, to pay annually to my beloved wife, Sophia, one thousand dollars for her support," &c. By another clause in his will, the testator declared that his estate in Marengo should not be divided, until his debts, and the legacies were paid. Held, that the will did not create a trust by implication in favor of creditors, which would take a debt due by the deceased out of the statute of limitations, or prevent it from running, or prevent the bar of the statute of *non-claim*.

Error to the Chancery Court sitting at Huntsville. Before the Hon. D. G. Ligon, Chancellor.

THE bill was filed by the plaintiffs in error, who alledge, that they are creditors of B. M. Lowe, upon four several bonds of \$6,000 each, and that one James Manning was a co-obligor, and surety upon said bonds. That judgments have been obtained against said Lowe on the bonds, and execution returned no property found. That Manning has departed this life, having on the 26th September, 1837, made his will duly attested, &c. which, among other clauses, contains the following :

"It is my will, that the interest which I have in a house and lot in the town of Huntsville, jointly with Thomas Bibb, Esq. of Limestone county, together with my lots lying in the towns of Triana and Florence, be sold, and the proceeds applied to the payment of legacies hereafter bequeathed, and the discharge of my debts. I hereby direct, and require my executors hereinafter named, to keep my estate in the county of Marengo, Alabama, together, until all my debts and lega-

cies are paid off and discharged, and out of the proceeds of my said estate in Marengo county, to pay annually to my beloved wife, Sophia, one thousand dollars, for her support and maintenance during the time that said estate shall remain undivided." The testator further expressed his intention, that his estate in Marengo should not be divided, until all his debts and the legacies given by the will were satisfied. The testator died first March, 1841, his widow and all his children surviving him, and B. M. Lowe and James Manning qualified as his executors, and entered upon the execution of their trust. That the wife of said Lowe was the daughter of said Manning, and has also departed this life, leaving certain children who are described.

It is admitted in the bill, that the bonds were not presented to the executors for payment, being with the obligee in the State of Connecticut; but that Lowe being the principal obligor in the bond, as well as one of the executors in the will, knew of their existence, and that they were unpaid, and had repeatedly by letter recognized them, but charges, and expressly relies upon the will of the testator, as having charged his real estate, with the payment of all his debts, &c.

The chancellor dismissed the bill for want of equity, which is the matter now assigned for error.

HOPKINS and S. PARSONS, for the plaintiffs in error, made the following points:

Upon the death of the owner of real estate, the title vests in his heirs at law, if he die intestate, or is transferred to his devisee if he devised the estate. 4 Ala. Rep. 681, 682, 752; 5 Id. 503.

The executor or administrator acquires no right to, or interest in, the estate, from the succession merely. Should the estate be insolvent, and this fact become known to the personal representative, the legal effect of the event, and his knowledge of it, makes it his duty to report the estate insolvent to the proper orphans' court, and apply for a license to sell as much of the real estate as may be necessary to pay the debts. 3 Ala. Rep. 61, 64; Clay's Dig. 191; § 1; 2 Peters's Rep. 523.

The truth of the report of the representatives may be de-

nied by the heirs and devisees, and unless the truth of the report can be proved to the satisfaction of the orphans' court, the license will be denied. 2 Ala. Rep. 660, 662, 663.

If the license be granted, the title will remain in the heirs or devisees till the estate shall be sold, and the personal representative ordered to convey to the purchaser, and the title is in fact made. 5 Ala. Rep. 324, 503.

The personal representative cannot pay debts out of the proceeds of the sale according to his own discretion, but the proceeds must be administered by him in conformity to the judgment of the orphans' court. That court determines what debts are valid, and to no others can any part of the proceeds be applied. Clay's Dig. 194, § 12.

When a personal representative acquires from the sources which have been mentioned, a right to apply for a license to sell the real estate, it becomes his duty to exercise it as a trustee for the creditors, and his report that the estate is insolvent, and application for a license to sell, are the commencement of a suit on his part for the use of the creditors, against the heirs or devisees. 2 Ala. Rep. 663.

The 9th section, on page 598 of Clay's Digest, recognizes the right of a testator to charge by his will the payment of his debts upon his real estate, and this section was enacted at the same time the first section was, to be found in Clay's Dig. 191, by which the lands of a testator or intestate are charged with such parts of his debts as his personal property may be insufficient to pay.

The right to charge by will the payment of debts upon real estate, is recognized also by the statute, which requires such of the executors as undertake the execution of a will, which directs or devises land to be sold, to make sale thereof, if no person be appointed by the will for the purpose, or the person appointed shall refuse to perform the trust, or die before he made the sale. Clay's Dig. 598, § 14. The act does not discriminate between sales devised to pay legacies or debts, or for any other purpose.

This power of a testator over his real estate, is recognized also by the statute which gave authority to the judges of the county courts to authorize an executor or administrator to keep the personal property of the deceased together for any

time not exceeding ten years. The 34th section of this act declares that the authority to be conferred under it upon a personal representative, shall not conflict nor defeat the provisions of the last will of the testator. Clay's Dig. 198, § 30, 31, 34.

All these statutes were enacted before the death of Manning, the testator in this case.

The debts and legacies of the testator are by the 4th clause of the will, expressly charged upon his real estate in the town of Huntsville, Triana and Florence. The lots of the testator in these towns, he directed by his will to be sold, and as no trustee was appointed by the will to make the sale, the executors who undertook the execution of the will, were bound to make the sale. Clay's Dig. 598, § 14.

By the 5th clause of the will, the executors were required to keep the estate of the testator in Marengo county together until the debts and legacies of the testator should be paid. Such authority to the executors, the statute law authorizes, and a county court could not in such a case act under the statute referred to in Clay's Dig. 198, § 30, because any permission it might grant to keep that estate together, would be embraced by the authority given by the will, and if permission to keep the estate together should be upon any terms different from the grant of the same authority by the will, such permission would conflict with the provisions of the will, and is prohibited by the 34th section of the same statute. The validity of such a direction and authority in a will, to keep an estate together, for the express or implied purpose of paying debts and legacies, is recognized by another statute of the State. Clay's Dig. 228, § 39; and also by a judgment of this court. *Bibb v. McKinley, Hopkins, and others*, 9 Porter's Rep. 648. The effect of this direction to the executors is, at least, a devise to them of the rents and profits of the land in Marengo, and vests in them the legal, as well as the beneficial interest therein. 2 Jarman on Wills, 533, II. and the authorities there cited. The only object in keeping the estate together was to enable the executors to pay the debts and legacies, and the annuity to the widow of the testator, as the fifth clause of the will directs. The executors are liable to the creditors in equity as trustees. 1

Howard's U. S. 150 ; 33 Com. Law Rep. 55 ; 10 Peters, 562, 563, 564, 532 ; 34 Com. Law Rep. 187. Such a devise or power authorizes the executors to sell the real estate to pay the debts and legacies, although no time is specified in the will for the payment of the debts and legacies. 2 Jarman on Wills, 535, 536, marginal pages, and the authorities there cited ; 6 Johns. Ch. Rep. 70, 74 ; 2 Vernon, 26 ; 9 Pet. 466 to 477 ; 3 Cond. Eng. Ch. Rep. 427, 428, and note A, and 429 ; 14 Eng. Ch. Rep. 504, note 1 ; 1 Vernon, 45.

The 6th clause of the will creates an implied charge upon the real estate at least in Marengo, because the intention of the testator is clearly shown, that all his debts and legacies shall be paid, before the estate in Marengo shall be divided among his widow and six children, to whom it is devised by the clause last mentioned, and directed to be divided as soon as all the debts and legacies of the testator shall be paid off and satisfied. 2 Jarman on Wills, 516, 517, and 519, margin ; Darrington, and others, v. Borland, 3 Porter, 10, 13 ; Graves v. Graves, 11 Eng. Ch. Rep. 310 ; Taylor v. Taylor, 9 Eng. Ch. Rep. 252 ; 3 Cond. Eng. Ch. Rep. 427, 428, note A, 429 ; 9 Peters, 461, 467 to 477 ; 3 Vesey, 738 ; 3 P. Wms. 96.

The charge created by the 6th clause of the will, authorizes a sale of the land to pay debts and legacies. 3 Cond. Eng. Ch. Rep. 427, 428, note A, 429 ; 2 Vernon, 26 ; 9 Pet. 467 to 477 ; 1 Vernon, 45 ; 14 Eng. Ch. Rep. 504, note 1 ; 8 Peters, 143 ; 1 Howard U. S. 150.

If the testator had intended that his debts should be paid out of the annual proceeds of the Marengo estate, yet as they have not been paid, although the bill states that the receipts by the executors as trustees had been more than sufficient to discharge the debts ; equity will decree a sale of the Marengo land to pay the debts. 14 Eng. Ch. Rep. 504, note 1 ; Evans v. Tweedy, 1 Beavan, 55.

The devisees of the charged estate take it subject to the payment of debts and legacies, and are trustees for the payment of the charge, as well as the executors. 3 Cond. Eng. Ch. Rep. 427, 428, note A, 429 ; 9 Peters, 466 to 477 ; 3 Peters, 99, 119.

If it be true, (which is denied where executors, trustees,

devisees and creditors, assenting to the charge, are the only parties,) that a testator cannot charge his personalty with his debts, an attempt to do so, by the same will in which he makes a charge of them on his real estate, would not impair the validity of the charge on his real estate, which he had a right to make. 14 Eng. Ch. Rep. 504, note 1; *Evans v. Tweedy*, 1 Beavan, 55; 4 Clarke & Finnelly's Rep. 397; 6 Mass. Rep. 151, 153, cited for defendants; 1 Vernon, 45; 3 Cond. Eng. Ch. Rep. 427, 428, note A, 429.

A charge by will upon real estate creates a lien upon it. 2 Jarman on Wills, 511. Should a devisee sell land devised with a charge upon it, the purchaser in taking the title, must find the source of it in the will which created the charge, and would be charged with at least constructive notice of the trust. The purchase money of lands charged by will must therefore go into the hands of the trustee for the payment of the debts, or the lands may be pursued in the hands of the vendee, who paid the purchase money to the devisee. 7 Paige's Ch. Rep. 421.

It is a mere contingency whether the personal representative may become interested in the real estate, and entitled to a cause of action for the use of the creditors against the heirs or devisees, and his contingent right creates no lien upon the real estate. 2 Ala. Rep. 662, 663; 2 Jarman on Wills, 511.

Under the English statute of 3 and 4 William IV. real estate not charged by will is administered in equity for the payment of the debts of the deceased, upon a suit brought against the heirs or devisees; but this statutory charge creates no lien upon the real estate, and the doctrine allowing charges by wills upon real estate, and confining the remedy on such charges to courts of equity is the same since, that it was before the enactment of the act of parliament. 2 Jarman on Wills, 510, 511; 8 Peters, 143; 1 Howard U. S. 150.

The charge by will creates a lien which extends from the testator's death till it produces enough to satisfy the debts or exhaust the charged estate, and thus includes a time in every case, during which the personal representative has no personal interest in the estate, from the death of the testator till the personal representative may obtain a license to sell real estate to pay debts. The charge by will gives the creditors

a certain interest protected by a lien, while the charge under the statute is contingent merely, unaccompanied by any lien. The charge in the will therefore secures to the creditors what the statute did not provide for their benefit, a lien upon the real estate from the death of the testator. The remedy upon this charge and lien is in equity only, and another benefit secured for the creditors by the charge in the will, is the exemption of their claims in equity against the trust fund from the general statute of limitations and the statute of non-claim.

But in this case the bill states the personal property is much more than sufficient for the payment of all the debts of the testator, the will therefore created a charge upon real estate which was not liable to creditors under the statute law, and could not become so.

The benefit of the trust created by the will cannot be obtained at law against the executors, but the suit to secure it must be in equity against the trustees. The trust therefore is a technical one, of which a court of chancery only has jurisdiction. 7 Johns. Ch. Rep. 98, 111, 114, 116; 10 Vesey, 453; 2 P. Wms. 144; 10 Peters, 180; 1 Howard U. S. 150.

As the debts due to the complainant were not barred at the death of the testator, by the statute of limitations, the statute did not run against them in equity afterwards. The failure of the trustees to pay the debts was a breach of their duty, and their neglect of their duty cannot be a foundation for the bar of the statute. 1 Sch. & Lef. Rep. 107, 110; 14 Eng. Ch. Rep. 503, note 1; 2 Vesey & Beam's Rep. 297, 281; 2 Hen. & Munf. Rep. 130, 136; 6 Johns. Chanc. Rep. 294; 4 Clarke & Finnelly, 397; 4 Cond. Eng. Ch. Rep. 414, 415, 417, 418; 3 Id. 742.

The statute of non-claim is a statute of limitations; it extinguishes the legal remedy only as other statutes of limitations do, leaving the debt in existence, and any equitable remedy there may be, unaffected by the loss of the legal remedy. 1 Ala. Rep. 710, 740, 741; 2 Id. 331. The testator had as perfect a right to create a trust by his will upon his real estate, at least for the payment of his debts, as he had to provide while he lived, a security by mortgage on his lands

for any of his debts. If a mortgage had been made by him, his right to execute it would have been exercised before he had any heirs, devisees or legatees. He made the charge by his will on his real estate while he lived, and when he had no heirs, devisees or legatees. The devisees and executors who claim the real estate under the will, can take it only subject to the trust with which the testator clothed it. The general statute of limitation, and the statute of non-claim, are for the benefit of the heirs or devisees, as the case may be. Neither can run against the trust, as the real estate, incumbered with the trust in favor of creditors, is what the testator devised to be divided among the devisees as soon as his debts should be paid. The contrary doctrine might give the devisees the whole interest in the real estate without the payment of the debts. The will is a law to the executors, the heirs, devisees and legatees, and the testator intended the first benefit for his creditors; that they should be fully satisfied, before his devisees should take any part of the Marengo estate. 9 Peters, 475; 3 Id. 119; 3 Porter's Rep. 33; 9 Id. 648. The equitable remedy must be sought not against the executors as such, but as trustees, and against all others who are trustees.

If the statute of non-claim intended for the protection of the legal rights of heirs, or devisees and legatees, could be made by construction, to apply to the equitable remedy for the debts of creditors, which the will intended should be fully paid, before the devisees should take any interest in the estate, upon which the charge was made, there was in this case what must be regarded as equivalent in effect to actual presentment of the notes to the executors. Presentment to one of two executors is sufficient at law. 4 Ala. Rep. 503. The object of a presentment is to inform the executors, or one of them, of the amount of the debt and the evidence of it. Lowe, one of the executors, had this knowledge. He was one of the makers, and knew how much was unpaid. Knowledge of an unregistered deed, which the law requires to be recorded, has the same effect as if the deed had been registered according to law.

It was decided in the case of Darrington, and others, v. Borland, 3 Porter's Rep. 10, that real estate could be charged

by a will with the payment of debts, and that a court of equity would decree the estate to be sold in execution of the trust, if the same had not been sold previously by the authority of an orphans' court. No such sale in this case has or can be made, by an order of an orphans' court, as the personal property of the testator was much more than sufficient to pay his debts. As the construction of our statute law upon the main point in that case was made so long ago, there are the same reasons for adhering to it, that were relied upon by this court in the case in 9 Porter's Rep. 572, 573, for abiding by a previous judgment of the court upon the same question. 13 Com. Law Rep. 412, 416; 7 Ala. Rep. 386. The implied exemption of the personal property specifically bequeathed by this will, is an implied charge of the debts upon the land. 1 Howard, 150.

As the will is the law of the executors, heirs, devisees and legatees, it is valid against them, although it exempts some or all of the personal property from liability for the debts of the testator, and charges them upon his real estate. 3 Por. Rep. 10; 9 Peters, 475; 3 Id. 119. Upon the same principle, where personal as well as real estate are included in the same trust, created by a will for the payment of debts, it is valid in equity, if the same will exempt other personalty from payment of debts, where it will be executed as to the personal property against the executors, heirs, devisees and legatees. Creditors only acting through the executors, cannot disturb it under any circumstances. The bill in this case is a creditor's bill, and it does not appear that any creditor has objected to the part of the trust of the Marengo estate, which consists of personal property. 2 Jarman on Wills, 548, at the bottom of the text on this page; 5 Metcalfe's Rep. 282; 1 Vesey, jr. 444; 10 Peters, 562.

The executors might in such a case as the latter, if there were creditors who claimed satisfaction of their debts out of all the personalty, against him as executor, file his bill in equity, that equity might be done to all. 9 Peters, 475. The creditors, in such a case, may file a bill against the executors as trustees, if the latter will not voluntarily perform such a part, as they may do. 1 How. U. S. Rep. 150. The statute of limitations is held to run against debts although

there may be a bequest of the personalty for the payment of them, upon the ground that such a trust does not vary from the legal trust of the personal property, which the law creates and devolves upon the executors, whose duties and liabilities are not altered by the mere fact that the testator has in express terms declared his personalty subject to the payment of his debts, as the law makes it liable in the same manner and to the same extent. 4 Clarke & Finnelly, 397. But in this case the testator bequeathed, in effect, as specific legacies, debts due to him from his children. He made specific bequests of slaves to some of his children, and similar bequests of slaves and other personalty to his widow, and charged his debts and general legacies upon his lots in the town of Huntsville, Triana, and Florence, and his Marengo estate. These bequests and devises are binding upon his executors, heirs, devisees and legatees, and as the exemption of the debts due from the children, from the claims of the executors, and a bequest of the slaves to his widow and some of his children, takes all these parts of the personalty out of the trust created by law upon the executors, they make an equitable trust against the executors, as trustees of the personal property included in the trust created by the will of the Marengo estate. But for this equitable trust, the debts due from the children would be the first portion of the personalty applicable to the payment of debts. If there were a legal trust against the executors, as such, on the personalty included in the Marengo estate, the whole personal property would be liable at law to the creditors, and the executors could not protect the debts from the creditors, due from the children. As the exempted portions of the personalty are protected by the equitable trust on the Marengo estate, the trust on the personalty included in that estate, can be reached in equity only, and no statute of limitation runs against the remedy against any part of that trust. How. R. 150 : 10 Peters, 532, 562-3-4.

C. C. CLAY, contra. A. R. MANNING, submitted the following argument :

I. 'The word 'presented,' used in the statute of non-claim (as it is called) is of the same origin as the adjective *present*, and imports that the claim shall be had present and (accord-

ing to another section) 'exhibited' to the executor. No waiver of the presentment or act intended as such, is pretended. See Jones' Ex'rs v. Lightfoot, 10 Ala. Rep. 17; Boggs' Ex'rs v. The Bank of Mobile, Ib.; and many other cases.

II. In respect to the trust supposed to be created by the will—

1. By the common law, not only will not language in a will—which in a deed would create an express trust of personal property to pay debts—not prevent the statute of limitations from barring, but it is not operative to create such a trust at all. (Nor is it exactly correct to say, that such language is effectual against legatees, distributees, &c. It is operative only as amongst them, and determines what part of an estate, of which each is to have a share, shall bear the burden of the debts.) Heines v. Spruill, 2 Dev. & B. Eq. R. 93, 101; Jones v. Scott, 4 Con. Eng. Ch. Rep. 413; same case in the Ho. of Lords, 4 Clarke & F. 384; Freake v. Cranefeldt, 3 M. & Craig, 500; Evans v. Tweedy, 1 Beavan, 55-7; 3 P. Wm. 89, (reporter's query;) Lewis' Ex'rs v. Bacon, 3 Hen. & Munf. 106. For, chattels are legal assets in the hands of the executor for the payment of all the debts alike, in respect whereof he is suable at law, by the creditors, or any of them. From this responsibility he cannot be released by any provision in the will. Testamentary creditor's liens therefore, (which to be valuable must be positive and exclusive,) would impair the rights of the executor, make the action of the courts of law and equity inharmonious in regard to his powers and liabilities, and render an instrument which, as a will, should depend for effect only on the act of the testator, and the condition of his estate, a contract, to which the assent of the creditors as parties, might sometimes be necessary. Such liens moreover, where in favor of some only of the creditors, would prevent that equal distribution among all which the law prescribes and equity loves, and increase greatly the difficulties of administering estates.

2. In Alabama, lands are also legal assets, in the power of executors, for the payment of all the testator's debts alike. The executor is chargeable for a *derastavit* if he do not have

them sold when necessary. He may have them sold in preference to slaves. His bond as executor must embrace their value ; he may rent them out during the whole period of his administration, and use the proceeds as assets ; and he is suable at law in respect to the realty. Moreover, the creditor himself, whether his judgment be obtained before or after the testator's death, may, by a *scire facias*, in a court of law, subject the lands to execution. Clay's Dig. 191, § 1 ; 224, § 16 *et seq.* ; 197, § 27 ; 199, § 36 ; 195, § 18 ; Fitzpatrick v. Edgar, 5 Ala. R. 502-3. The liens too, thus created by statute in favor of creditors, are superior to any interests that can be created by will, and attach to the lands, no matter to whom they go, whether to heirs, &c. or purchasers from them. Darrington v. Borland, 3 Porter's Rep. 26, 34 ; Graaf v. Smith's adm'rs, 1 Dal. Rep. 481 ; Willard v. Nason, 5 Mass. R. 240. And the lands are no less assets because the chattels are generally to be first used as such, than the chattels would be because the executor, if his inventory should show that he had money enough to pay the debts, would not be permitted to sell slaves for the purpose.

3. The argument from the 10th section of the act concerning wills, (Clay's Dig. 598, § 9,) is in favor of the defendants instead of complainant. For, by the preceding section, legatees who may happen to be subscribing witnesses to the will, are deprived of their legacies, in order to make them competent to testify in its support. Why then should the very next clause provide that creditors, whose debts are charged by a will upon the realty, shall be competent witnesses to establish the will, unless the legislature contemplated that the provision made for them by that instrument, was superseded by the similar provision of a charge upon the land, made for them by the first section of that same act. To hold otherwise, might enable a creditor who was barred shortly after the testator's death, to recover by his own testimony, and this when the testator, if he were living, might perhaps be able to show that the debt was paid.

4. It is not necessary to dispute the authorities cited by complainant's counsel from England, and from States in which lands are not made legal assets for the payment of all of testator's debts alike, and to be administered by the exe-

cutor. The *dicta* in some of the cases go far beyond the decisions.

In *Fenwick v. Chapman*, 9 Peters, 468, emancipated slaves, legatees of their own freedom, and of pecuniary bequests, were the suitors, and the court *in favorem libertatis* held, that the real estate must be sold before they should be for the payment of debts.

In *Adams v. Breckett*, 5 Metc. 280, as in several other cases, the question was between heirs, devisees, &c., and not between them and creditors, claiming as such, to be *cestui que trust* under a will.

In *Peter v. Beverly*, 10 Peters, 567, the facts made a strong case, very different from the present, and the only statute which affected the question was one of Maryland, which committed it to the discretion of a chancellor, to determine whether the lands descended or devised to minors, should be sold to pay debts of the decedent, and did not make them assets otherwise.

The case of the *U. S. Bank v. Beverly*, arose out of the same facts.

In the cases of *Duval's heirs v. McLosky*, 1 Ala. R. and *Boardman v. Inge*, 2 Ib., the debtors, while living, conveyed the lands by mortgage deeds to the creditors; who, therefore, had the legal estate; while only equities of redemption remained in the debtors, as their estates therein.

The case of *Darrington v. Borland*, 3 Por. Rep. 10, the only case directly in point, arose prior to some of our enactments in reference to lands as assets. And in it, the question, whether such liens as we are considering could be created by will, seems not to have been discussed; but only whether the words used were sufficient to create one. It seems to me, that the decision upon this point, in that case, is not law; and, that specific liens or trusts, in either realty or personalty, in favor of creditors, entitling them as such, to insist upon them, cannot in this State be created by will. See also *Man v. Warner*, 4 Wheat. 455; *Smith v. Porter*, 1 Binn. 209; *Hays v. Jackson*, 6 Mass. R. 153.

III. But if they could be, did the testator in this case intend to create such a trust for the creditors? See 2 Jarm. on Wills, 520.

1. A trust is not to be raised by implication, unless it be necessary to carry out the intention. *Cook v. Fountain*, 3 Swanst. R. 592. Here it is not necessary.

2. The law of a place where a will is to operate, in reference to the subject of it, is as much a part of the will, as if incorporated in writing into it. Hence, in England, a will with a clause like the 5th in Dr. Manning's, would formerly have read thus: By law, my real estate is not, upon my death, chargeable with all my debts; but "I hereby direct and require my executors to keep my estate (partly realty,) in — county together, until all my debts and legacies are paid," &c. This would very easily bear the construction, that a charge was intended. But a similar will in Alabama would run thus: By law, all my property, real and personal, and effects, are chargeable with my debts; but "I hereby direct and require my executors to keep my estate in — county together," &c. This would seem to postpone the payment of creditors, (if it could do so,) and shows that the testator was providing, not for them, but for his children, who are afterwards to have this estate.

3. All devises, in regard to the interest of the persons who are to enjoy the estate as devisees, are in the nature of specific devises; and the property which is the subject of them, although there be a general charge of the debts upon it is the very last of the testator's estate to be used to pay the debts. *Milnes v. Slater*, 8 Ves. 303; *Livingston v. Newkirk*, 3 J. Ch. R. 312, 322.

4. It is clear from the will, that the testator was only directing the executors in the discharge of their office, for the benefit of his children, and not creating liens in favor of his creditors.

IV. The statute of non-claim constitutes a bar in chancery, as well as at law, for—1. A legatee is much more a *cestui que trust* under a will, than a creditor can be; and the charge of the legacies and debts upon an estate, are generally, as in this case, made by the same identical words. Yet the former is barred by the statute of limitations in equity, when barred at law, and so must the latter be. *Wood v. Wood*, et al. 3 Ala. R. 756; *Maury's Adm'rs v. Mason's*

Adm'rs, 8 Por. 211 ; Kane v. Bloodgood, 7 J. C. R. 90 ; Talbott v. Todd, 5 Dana's R. 199.

2. Much more is the statute of non-claim a bar. This is not a limitation of the time when certain actions at law may be brought. But "all claims" against the estates of deceased persons not presented as it prescribes, are "forever barred from a recovery," in any fourm. Jones's Ex'rs v. Lightfoot, 10 Ala. Rep. 17 ; Decatur Bank v. Hawkins, 12 Ib. 755. The "estates of deceased persons" are those interests in lands, hereditaments, chattels, &c., and those rights and credits which belonged to, or were of such deceased persons, at the time of their death. Hence all claims against such estates would embrace even those of a legatee named in the will, or of an heir, so broad is the expression ; and the former is clearly a *cestui que trust*. But as the legislature did not intend to bar "heirs or legatees, claiming as such," they are specially exempted by the *proviso*, from the operation of the statute.

The act was adopted to compel speedy settlements of estates, so that legatees, devisees and heirs, might soon obtain their several portions, and so that they, and the public who should deal with them, in respect to such portions, might not be deceived, and injured by secret claims of which the only evidence might remain for years unknown, in the pockets or drawers of creditors. "It is emphatically a statute of repose." And certainly the sovereign power, which can regulate the descent and distribution of property, upon the death of its owner, and its liability to creditors, has a right to prescribe how long thereafter, and under what circumstances, such liability shall exist. See Thrash v. Sumwalt, 5 Ala. Rep. 20 ; Gookin v. Sanborn, 3 N. Hamp. Rep. 491 ; Brown v. Anderson, 13 Mass. Rep. 203 ; The Decatur Bank v. Hawkins, *supra*.

COLLIER, C. J.—We do not deem it necessary elaborately to consider the doctrine, that a trust for the benefit of creditors, attaches to a devise of real estate, where the words "after my debts are paid," or other equivalent terms are used by the testator. This doctrine owes its introduction into

British jurisprudence to the exclusion of simple-contract-creditors from the lands of their deceased debtors, as the means of satisfying their demands, and has often been carried to an extent not contemplated by the testators. Treating of this subject, an elementary writer of great respectability says, "it seems to be generally admitted, that the courts have allowed their anxiety to prevent moral injustice, and that men should not sin in their graves, to carry them beyond the limits prescribed by established general principles of construction." 2 Jarm. on Wills, 520. The trust being ascertained, the debts were considered as withdrawn from the influence of the statute of limitations, where the bar was not complete before the testator's death. See the learned judgment of Sir William Plumer, in *Burke v. Jones*, 2 Ves. & B. Rep. 275, and cases there cited; 2 Story's Eq. § 1245, 1246-7.

It is natural enough that terms not the most significant and direct, should be seized upon to create a trust upon the real estate of a testator for the payment of his debts, where the creditor, according to the law, could not otherwise subject it to liability. There are few men who do not cherish an innate sense of justice, and are pleased to see it accorded to others; no matter how unwilling they may be to render it, where it costs a sacrifice of interest or feeling. Judges are but men, and, with the most honest intentions, sometimes unconsciously yield to the extraneous influences which operate on others. Hence we have no difficulty in accounting for the implication of a trust upon grounds often unwarrantable, in cases analagous in point of fact to the one now before us. But in this State, where all distinction in dignity as it respects the debts of a deceased person, is abolished, and a debt by simple contract is placed on the footing with one which is evidenced by a record, if the latter is not a lien on the debtor's estate, it cannot be expected that the courts should be astute in creating trusts by construction.

According to the common law, if a testator devotes his land to the payment of his debts, without particularizing or distinguishing them, it is regarded but a fair construction of his will, to suppose that he intended to embrace all the debts which were recoverable at the time of his death: But is it

allowable to deduce this inference from the same terms, applied to the same description of property, where by statute it is already charged with the payment of the decedent's estate? Is there not great danger under such a state of the law, of making that which the testator intended as a direction to his executor, when his devisee should be let into the enjoyment of his bounty, a condition precedent to the enjoyment? In England, personal estate in the hands of the executor is a fund for the payment of the debts, and words which would create a trust upon the realty of the testator, will have the effect of modifying the duties of the executor as the personal representative. True, in *Jones v. Scott*, 1 R. & Mylne's Rep. 255, Lord Brougham decided, in opposition to the master of the rolls, that there was no difference "between a charge upon the real and a charge upon the personal estate." It was admitted that the point had never received a judicial decision, and the Lord Chancellor advised that it should be reconsidered elsewhere. An appeal was accordingly taken to the House of Lords, where, after great consideration, the decree was reversed. Lord Lyndhurst, in pronouncing the opinion of the court, said, "Had it been real estate, in that case the plaintiff would have been entitled to recover, but though part of the personalty, it is said to be taken subject to the trust, and the question is, whether a trust of this description declared of the personal estate, prevents the statute of limitations from being set up by way of defence; and I am clearly of opinion that it does not at all vary the legal liability of the parties, or make any difference with respect to the effect and operation of the statute itself. The executors take the estate subject to the claim of the creditors; they are in point of law the trustees for the creditors; the trust is a legal trust, and there is nothing whatever added to their legal liabilities, from the mere circumstance of the testator himself declaring in express terms, that the estate shall be subject to the payment of his debts. I conceive therefore, that the circumstance of there being an express trust in this case, does not make any alteration with respect to the question. And if in ordinary circumstances as to personalty, where there was a mere legal liability, the existence of a mere legal trust would not have been an answer to a plea

of the statute of limitations ; so I conceive, that in the present case, no alteration can take place, from the existence of an express trust, and that that trust cannot, under these circumstances, be considered as an answer to the statute." This opinion was approved by Lord Cottenham, in *Freaker v. Crane-feldt*, 3 Mylne & C's Rep. 500, who said it was a direct authority for holding that a direction in a will for payment of debts, was merely inoperative so far as the personal estate was concerned. See also *Crallan v. Oulton*, 3 Beav. Rep. 1; *Ault v. Goodrich*, 4 Russ. Rep. 430 ; *Roosevelt v. Mark*, 6 Johns. Ch. Rep. 293 ; *Evans v. Tweedy*, 1 Beav. Rep. 55. In *Crallan v. Oulton*, *ut supra*, the testator directed his debts to be paid out of his real and personal estate, and provided that if his personal estate should fall short in paying his debts his executors should enter into the receipt of the rents of his freehold, until the same should be wholly paid off. The personal estate was sufficient for the payment of the debts ; it was nevertheless held, that a trust had been created for the payment of the debts out of the realty so as to prevent the operation of the statute of limitations ; and that the real estate remained liable to pay a simple contract debt, which had been left unpaid after distribution of the residuary personal estate.

The cases of *Fenwick v. Chapman*, 9 Pet. Rep. 461 ; *Peter v. Beverly*, 10 Pet. Rep. 562 ; *Bank of the U. S. v. Beverly*, et al. 1 How. Rep. 134, we think are in harmony with the English decisions, and perhaps go quite as far in implying a trust for the payment of the testator's debts, and in the consequences deduced from it. See also *Lewis's Ex'rs v. Bacon's Legatee and Ex'r*, 3 Hen. & M. Rep. 89.

In *Hines v. Spruill*, et al., 2 Dev. & Bat. Eq. 93, the testator by his will, gave to his two sisters all his land, "together with all cattle, horses, and other appurtenances thereto, except so much thereof as will pay my just and lawful debts, which I think may be done from the crop now growing thereon." He also gave to the same persons all his negroes : Held, that the will did not create a charge upon any part of the property for the benefit of creditors, beyond that

which the law imposes upon the testator's estate; that if the words "except so much thereof as will pay my debts, which I think may be done by my crop growing thereon," create a charge, it is confined to the cattle, horses and other appurtenances mentioned in this clause. These were the subjects immediately antecedent to the exception." The fund which the testator trusted would be sufficient, was of the character of appurtenances—the then growing crop. It was also directed by the will, that the negroes should remain on the plantation, until one of his sisters, who is made a legatee, should become of age, at which time he wished the property divided. Upon this provision the court remarked, that creditors could not wait until the sister became of age, "and until that time at least he contemplated that the plantation should continue entire, and the negroes, who were certainly given without any charge, were to remain thereon. It was therefore concluded, that it was not the intention of the testator to *charge* any part of his property *to his creditors*." Speaking of the English decisions on the subject of charging *lands* by will, for the payment of debts, it was said, "In that country lands are not, (or at least were not when these decisions were made,) liable for the payment of the simple contract debts of the deceased. He cannot alter the law and make them directly liable, but having a right to devise his lands, he may devise them either absolutely, or subject to any reasonable condition. When therefore a court of equity collects from a will so executed as to be effectual to pass lands, that the testator devises that his lands shall be subject to the payment of all his just debts, they give effect to this will in the only mode by which it can operate. They hold that it is a devise in trust for the payment of debts—that the lands are by force of the will *charged* with the payment of debts. But we can find no case—no dictum—where, in that country, a testamentary disposition is made of chattels, subject to the payment of debts, that the liability of those chattels *to the creditor* is in the slightest degree affected thereby. The testator can give no chattels but subject to the

payment of debts. All his chattels are immediately liable to his creditors. The chattels do not pass by his gift to the legatee—but they go *first* to the executor, and the law has prescribed their liability, and his liability by reason thereof, to the creditors—and the liability of legatees, if the executor delivers them over, without satisfying or providing for the satisfaction of their demands.”

It is enacted, by a statute passed in 1806, that the lands, tenements and hereditaments of the testator or intestate, shall stand chargeable with all the debts of the deceased, over and above what the personal estate shall be sufficient to pay. In 1803, 1818, 1820, and 1822, acts were passed authorizing the sale of the lands belonging to the estate of a deceased person, upon application to the orphans' court, either upon a deficiency of personal property, or where it would be more beneficial to the estate to sell the lands than the slaves, &c. See Wyman, et al. v. Campbell, et al. 6 Port. Rep. 219. It is also provided, that whenever an executor, &c. shall fail to apply to the orphans' court for the sale of real estate, for the purpose of paying debts of the deceased, the judgment creditor may proceed by *scire facias*, and subject the lands to the payment of his demand; and if an executor, &c., shall fail to apply for leave to sell real estate, three months after reporting the estate insolvent, he shall be deemed guilty of a *devastavit*, and himself and sureties may be sued on his bond. Clay's Dig. 197. So it is made lawful for executors, &c., to rent at public outcry, the real estate of any decedent until he makes a final settlement of his accounts; and the proceeds shall be assets in his hands. Id. 199. And by a statute subsequent to the testator's death, the orphans' court granting letters testamentary, &c., is required to take into the estimated value of the estate, the real estate of which the testator, &c., may have died siezed or possessed of, and shall require of the executor, &c., a bond with security under such penalty as the law previously required. Id. 229.

These several legislative provisions may suffice to show that lands in this State are subjected to the payment of the

debts of a deceased person, where the personal assets are insufficient, and that in such case it is not only competent for, but the duty of the executor to take proper measures to make them available. It must be conceded that the important modifications they make in the common law, when connected with the equalization of debts in point of dignity, should indispose us to extend the doctrine of implied trusts, such as we are considering. We will not deny that it is within the power of a testator so to provide by will that his real estate shall be charged beyond what the terms of our statutes direct; though the authorities cited are conclusive to show that the course of administration in respect to the personalty cannot be thus controlled.

In *Darrington v. Borland*, 3 Porter's Rep. 9, two points material to the present inquiry are determined. *First*—That a testator may charge his real estate beyond what it is charged by the general law. *Second*—That by postponing the distribution between his devisees until his debts are paid, it is so charged. If the question were now presented to us for the first time, we should be inclined to think that the intention to extend the charge created by the general law, could not be inferred from the terms of the will in that case; and we do not desire to be understood as giving our sanction to such an interpretation. Is it at all probable that the testator in that or the present case intended to withdraw his debts from the influence of the statutes of *limitation* and *non-claim*, and allow their payment at any future period, though his executor had performed and closed his trust, or wasted the assets which should have been applied to their extinguishment? We cannot think that the testator in either case intended to keep the adjustment of his estate open for an indefinite period, or that the statutes of *limitation* and *non-claim* were in any way presented to his mind.

Although the question of these statutory bars was not raised upon the record in the case last cited, yet the opinion of the court is expressed as to the effect of the supposed trust upon them; and it was said that either of them might be successfully relied on, by the devisees. Mr. Justice Story says that "a general direction in a will of personal estate to pay debts, will not stop the running of the statute of limitations, or if

the bar has already attached, remove it. The same rule is equally applicable to the case of a devise or charge upon real estate for the payment of debts. In no case will it take the case out of the operation of the statute of limitations, or prevent the running of the statute." Sto. Eq. § 1521, (a) ed. of 1846. We cite the language of the learned author, though it must be admitted that the citations he makes from the English authorities do not sustain the latter part of his proposition, viz: *that the trust upon the realty does not prevent the running of the statute.* The learned counsel for the plaintiff in error is mistaken in supposing that Darrington v. Borland was re-affirmed in Hitchcock's Heirs and Adm'r v. The U. S. Bank of Penna. 7 Ala. Rep. 386; it was merely cited as to one point, which is not presented in the case at bar. We have not denied that it is competent to devise lands to a trustee for the payment of debts, &c.

The statute of non-claim differs in its effect and consequences from the statute of limitations, technically so called—it must be insisted on by the personal representative, and cannot be safely waived. It requires claims against the estates of deceased persons to be presented to the executor or administrator within eighteen months, &c. "and all claims not so presented within the time aforesaid, shall be forever barred from a recovery: *Provided*, that the provisions of this section shall not extend to persons under age, *femes covert*, persons insane or *non compos mentis*, to debts contracted out of the State, nor to claims of heirs or legatees, claiming as such." Clay's Dig. 195, § 17. This enactment was not designed merely as a security for the estate against neglected and dormant claims, but was intended for the benefit of heirs, distributees and devisees, whom the policy of the law requires should be placed in a condition in which they may safely act with property apparently their own. The Br. B'k at Decatur v. Hawkins, at this term.

It is provided by statute in Massachusetts, that the real estate of a deceased person may be sold by his executor, &c. when the goods and chattels in his hands shall be insufficient for the payment of debts with the charges of administering, upon obtaining a license therefor from either one of several courts specifically mentioned. Rev. Stat. of Mass., ed. of

1836, p. 452, *et seq.* In that State, the bond of the executor stipulates, not only for the proper administration of all the testator's goods and chattels, rights and credits, but for the proceeds of all his real estate, that may be sold for the payment of his debts or legacies, which shall at any time come to the possession of the executor, or to the possession of any other person for him. *Id.* 422. It is also enacted that "no executor or administrator, after having given notice of his appointment," &c. "shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four years from the time of his giving bond as aforesaid, excepting in the cases hereinafter mentioned." One of these exceptions allows, under certain circumstances, an action to be brought within one year after an inability to sue, &c. is removed, although the limitation prescribed has expired. Under this legislation, a decision altogether pertinent to the case before us was made in *Hall v. Bumstead*, 20 Pick. Rep. 2. *Shaw, C. J.* in delivering the opinion of the court, said, "In this commonwealth, the liability of heirs for the debts of an ancestor, depends wholly upon statute, and is provisional only. By the statute, heirs, when bound at all, are liable, whether heirs are named in the obligation or not; so they are liable as well for debts by simple contract, as for specialty debts; so devisees are liable as well as heirs, to the extent of the property received by devise; so legatees or distributees of personal property are liable as well as those who take a freehold by descent; in all which respects this statute liability differs from the liability of heirs at common law. Here, it is the policy of the law to make all property liable for all the debts of the deceased owner, and in the first instance, to place it under the administration of an executor or administrator; and in pursuance of the same policy, land is made assets provisionally in the hands of the administrator, after the personal property is applied. The rule of the common law, making the specialty debt of the ancestor *de facto* that of the heir, and presuming that the heir has assets, until he shows the contrary by plea, does not prevail in this commonwealth." *Again*: "Every demand which can be made and enforced against the estate of a deceased person, is to be pur-

sued against the administrator where it can be done, and the whole estate, personal and real, is in effect made assets in his hands to meet such claims. This object is one of great importance, by securing, as far as practicable, an early and final settlement of estates, so that the residuum may be distributed among those entitled, free of incumbrances and charges, which would lead to protracted litigation. To enforce this policy, it is provided that all suits against executors and administrators must be commenced within four years from notice given according to law, and not afterwards. This is an absolute bar, given for the benefit of heirs and devisees, that they may hold their respective interests in the property, without claim or incumbrance." 13 Mass. Rep. 201; 16 Id. 429; 5 Pick. Rep. 140.

Such being the object and policy of the statute of non-claim, we are inclined to think that its effect is to throw upon the creditors the necessity of presenting their demands to the executor, or administrator, before any trust by implication can become operative against the heir or devisee. Have not the legislature very significantly indicated that the heir or devisee shall take the estate freed from all implied trusts for the payment of the testator's debts, if they are not presented to the personal representative within the time prescribed? If this be so, it is an indispensable duty of the courts to sustain—not to defeat the legislative will.

Such is the authority and duty of an executor in respect to the real estate of his testator, that no disposition could be made of it by will, which would withdraw it from liability to pay the testator's debts, if its appropriation should become necessary. If devised, the devisee takes it *cum onere*—subject to the provisional duty and authority of the executor. It may well be questioned whether by any other than express terms, or language most significant and direct, a testator in this State can throw upon his heirs or devisees, the burthen of paying claims, other than those excepted from the influence of the statute, where the creditor omits to present and enforce them against the personal representative.

The construction contended for by the plaintiffs' counsel would make it difficult, if not impossible, for an heir or devisee, or a purchaser from either, where the will, according

to the common law, made the real estate subject to the testator's debts, to act with safety in the sale or improvement of the estates received by them under the will; lest debts of which they had no means of ascertaining, and of which the negligence of the creditor has prevented the payment, should afterwards be enforced. If, in the present case, a trust can be established, it would be hazardous for a testator to give any directions in respect to his land in connection with his debts, if he did not intend to take them out of the course of administration which the legislature has prescribed, or to arrest the operation of the act of limitations, and dispense with the statute of non-claim. Under, perhaps, a majority of wills in this country, the administration would be disturbed—trusts would be created involving responsibilities and consequences which testators never contemplated, and procrastinating to the prejudice of heirs and devisees, the settlement of estates to an indefinite period. The duties of an executor, instead of being controlled by the statutes which apply to the estates of deceased persons, would be regulated by principles recognized by the English chancery, under a state of the law altogether different from ours—and when, too, we have studiously endeavored to avoid the very evils that superinduced them. Our policy is decidedly adverse to the origination of trusts by implication for the payment of debts, not only because it is unnecessary, but because the character of the executor is changed to a mere equitable trustee, not accountable to the orphans' court, and whose default in that character, perhaps his administration bond would not cover. In *Cook v. Fountain*, 3 Swanst. Ch. Rep. 592, it was said by Lord Chief Justice Raynsford, that "the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico*."

Whatever construction might be placed by an English chancellor upon the different clauses of the will from which it is attempted to deduce a trust, in view of our statute law,

which has effected such important modifications as to the powers and duties of an executor, they can be regarded as nothing more than mere directions by the testator as to the mode of fulfilling his intentions—as an expression of his wishes, how, and from what portion of his estate, the means of paying his debts, and some of his legacies, should be raised. The direction to keep his Marengo estate together, until his debts, and the legacies he had given, should be “paid off and discharged,” could not operate to the prejudice of his creditors; for if their demands were not extinguished before judgments were recovered, they could coerce a sale.

It is a matter not unworthy of consideration in a proper case, that in this country, where land is so abundant, it is much less appreciated than at least one description of personal property; and as it can be so easily obtained, it is often most beneficial for a testator's estate, that it should furnish by a sale the means of paying his debts. Besides, considerations of humanity and benevolence may make it desirable, and even a duty, to provide for retaining the slaves in his family. Under such circumstances, would it not be unjust to raise a trust which would render inoperative the statutes of *non-claim* and *limitations*, from the mere fact that the will made the lands primarily liable for the payment of the testator's debt, when he never could have contemplated such a consequence.

The cases of *Duval's Heirs v. McLoskey*, 1 Ala. Rep. 708, and *Inge, et al. v. Boardman*, 2 Id 331, bear no analogy to the present. There the creditors had specific liens under mortgages, which invested them with the legal estate. The lands of the debtors were pledged—the mortgagee had a remedy in equity, by which this pledge and lien could be made available. This remedy did not require a presentment of the mortgagee's claim to the administrator, to authorize its enforcement. If the creditors had looked to any other portion of their debtor's estate, then it would have been necessary to have presented their claims to the executor within the time directed by the statute.

Having determined that the testator did not create a devise by implication for the payment of his debts, so as to arrest the operation of the statutes of *limitations* and *non-claim*

and give to a court of chancery, jurisdiction to subject his real estate to the payment of a debt at the suit of a creditor, it is unnecessary to consider the effect of the allegations in the bill as to the presentation of the complainant's demand. The decisions of this court as to what will constitute a presentment within the meaning of the statute, furnish rules by which, in almost every case that occurs, it may be determined whether the claim has been duly presented to the executor or administrator. It remains but to add, that the decree of the court of chancery is affirmed.

CHILTON, J.—I concur in affirming the decree of the chancellor, because, the language employed in the will, when construed with respect to the existing law of the land, creates no trust which, under the circumstances of this case, the court of chancery has jurisdiction to enforce.

I do not propose to enter into a discussion in support of the views I entertain, which do not accord with some of the conclusions attained in the opinion of the Chief Justice; but will content myself by briefly stating them, so that my position may not be misunderstood, should similar questions again come before the court.

By the statute law of this State, "lands stand chargeable with all the debts of the deceased, over and above what the personal estate shall be sufficient to pay," (Digest, 191, § 1,) and the mode is pointed out how a sale is to be effected, in cases where the will does not authorize a sale by the executor. Ib. 224, § 16, *et seq.* He may rent the real estate until final settlement. Ib. 199, § 36. And unless the executor or administrator apply for leave to sell the real estate within three months after the estate is declared insolvent, he is guilty of a *devastavit*. Ib. 198, § 27. County courts may, when the estate would be less injured by a sale of land than of slaves, order the former to be sold. Ib. 195, § 18. In the granting of letters testamentary or of administration, the judge of the orphans' court is required to take the land into the estimated value of the estate, and to require bond in double the value of the whole estate. Digest, 229, § 44. These various enactments, with others which might be referred to, show the design of the legislature in vesting in the

orphans' court plenary powers for the subjecting of real estate to the payment of the debts of the deceased, and that it is the policy of our law to subject the estate, both real and personal, of decedents, to the payment of his debts, in the most summary, expeditious, and least expensive mode which could well be adopted.

At the common law, real estate of deceased persons was not liable to the payment of their simple contract debts, unless such estate was charged by will, and as this provision sometimes operated very harshly, the chancery courts of England, as was said to prevent men's *sinning in their graves*, very eagerly sought and seized upon any expression in a will, in cases where the personal estate was insufficient for the payment of the debts, from which to educe the conclusion, that the testator intended to charge his land with the payment of his debts. Hence these courts, from an early period, endeavored to give effect to a general direction by a testator for the payment of all his debts, by construing it into a trust for their discharge out of his real estate. 1 Roper on Leg. 573; 6 Cruis. Dig. Tit. 31; ch. 16, § 7. Thus commenced a series of judicial decisions which has been continued down to the present time, settling and establishing beyond controversy the English doctrine to be, that a general introductory, or prefatory direction by a testator for the payment of debts, followed by a disposition of his estate *both real and personal*, will, if necessary amount to a trust for the payment of his debts out of the real estate. Troth v. Vernon, Prec. Ch. 430; 2 Vern. 690; Ib. 709; 1 Bro. C. C 273; 3 Ib. 157; 2 Ves. Jr. 328; 3 Ib. 545; 2 M. & Cr. 695.

But it is said, in such cases the trust is raised by implication only, as being necessarily intended by the testator, and that it may be rebutted if other parts of the will are inconsistent with an intention on the part of the testator to create such a trust. Palmer v. Graves, 1 Keen, 550; Price v. North, Phill. 86; Hill on Trustees, 345. Now the reason, which in my opinion lies at the foundation of this series of English authorities, does not apply in this State, where, as I have shown, such ample provision is made by law for charging the real estate with the payment of all the debts of the

testator, both those which are simple contract debts, and those which are not. It is true, the same doctrine is held by the courts of England, since the statute of 3 and 4 Will. IV., c. 104, which makes freehold and copyhold estates assets for the payment of simple contract debts, &c., but it will be observed, that this statute is confined to those estates which the decedent "shall not by his last will have charged with, or devised subject to the payment of his debts." 12 Sim. 274. Also, *Bell v. Harris*, 4 M. & Cr. 269. The case of *Darrington, et al. v. Borland*, 3 Por. Rep. 9, favors the English doctrine, and it is there held, that a will containing these words, "I will that all my just debts should be paid previous to any distribution of my estate," &c., and by a subsequent clause bequeaths all his estate to be equally divided between six devisees, created a trust on behalf of creditors which a court of equity would enforce, notwithstanding the personal estate which had been wasted, was sufficient to have paid the debts. This decision, so far as it respects the construction given by it to the act of 1806, subjecting lands to the payment of debts, no matter how devised, was sanctioned by this court in *The Heirs and Adm'r of Hitchcock v. The U. S. Bank of Pen'a*, 7 Ala. R. 441, and thus far, it meets my approbation. But that a specific lien upon the land was created by virtue of the will, or that a trust was created by the will which a court of equity will enforce, irrespective of the personal estate made by law primarily liable, does not accord with my view of the law. Why is it that all the courts agree that in the construction of wills the *intention* of the testator is to be the true guide, and yet that intention is so often thwarted, by raising implied trusts, which were evidently never contemplated by the testator? Now in respect to the terms, "*rents and profits*," these words are often, by a strained, technical, artificial construction, extended quite beyond any meaning which the testator intended them to have, and to raise a sum by "*rents and profits*," is held the same as raising it by sale. 1 Ch. Cases, 173; 2 Ib. 205; 1 P. Wms. 415; 1 Atk. Rep. 505; 6 Johns. Ch. Rep. 70; 1 Ves. 41. And yet Lord Hardwick observed, that there was not one case in ten where the court had decreed a sale on the words *rents and profits*, that it had been agreeable to the testator's

intention. I do not wish to be understood as holding that there may not be cases where, it being impossible to carry out the intention of the testator, the court may effect as near as may be, the end, by a resort to other means than those contemplated in the will; but the principle for which I contend, and which applies to this case is, that *the court of chancery should never imply a trust in the absence of all necessity, and merely for the purpose of attaching jurisdiction.* 2 Story's Eq. § 1195. This would be the effect of such implication in the present case. The personal estate is amply sufficient for the payment of the debts—this estate is made by the law first liable to their satisfaction, unless the orphans' court shall deem it more for the benefit of the estate to sell the lands. The mode pointed out by the statutes for the appropriation of the estate to the payment of the debts is plain and expeditious. Now is it reasonable to conclude from the general expressions used in this will in regard to the payment of debts, that the testator intended to withdraw his real estate without the pale of the law, and the guards which are by law thrown around it? That he intended to waive for his estate the statutes of limitation and of non-claim, (for in my opinion, if a trust is created, such as the will assumes, both are waived,) and to make his executor a special trustee? Does it not better accord with the established rules of interpretation, which require that the intention of the testator, to be gathered from the whole will, should be carried out, to conclude, that these general expressions relied upon by the plaintiff in error to raise a trust, were but recognitions of the law as it existed, and to the requisitions of which, as it respects the charging of lands for the payment of debts on failure of personal assets, the will must give place, regardless of its provisions? But I am departing from my design, which was merely to state my conclusions. In my opinion, it is competent for a testator to charge his real estate with the payment of debts by express provisions in his will, and that a court of chancery will enforce the lien thus created, if it can be done without a violation of the law, in behalf of creditors. That in the en-

forcement of such trusts in equity, neither the statute of limitations, which had not perfected a bar when the trust attached, nor the statute of non-claim, can be available as a defence to the trustee; and that although, in a proper case, a trust may be raised by implication, still this should never be done in the absence of all necessity, and in cases where the law more effectually carries out the object to be accomplished.

I confess, that upon the argument of this cause, my mind was strongly inclined to yield to the weight of the English authorities, which have been followed in many of the States, but upon more thorough investigation, I am satisfied they are opposed to the spirit and policy of our statutes, and the proper and expeditious administration of estates, and that the reason which in my judgment lies at their source no longer exists.

BOHANNAN v. CHAPMAN.

1. An action of detinue for a slave, is not barred by the statute of limitations of six years, unless the adverse possessor, has been within this State six entire years, so that he could have been sued in the courts of this State.
2. Admissions of an agent, to be binding on the principal, must be made at the time of doing some act in the execution of his authority, in respect to the property, with which he is entrusted as agent.

Writ of Error to the Circuit Court of Montgomery. Before the Hon. G. D. Shortridge.

THE defendant in error, as the administrator of Mrs. Clough, brought detinue against the plaintiff for a slave.

The defendant below pleaded the general issue, and the statute of limitations of six years.

To this plea of the statute of limitations, the plaintiff replied, that there was no person within the State of Alabama, against whom this action could have been sustained for the recovery of said slave, from the time the cause of action accrued, until within six years next preceding the bringing of this suit; but that one Randal Mallet, who took said slave from the possession of the plaintiff's intestate, removed with said slave to Mississippi, where he continued to reside until his death; and that in January, 1839, within the period of six years next preceding the bringing of this suit, the said slave was brought into the State of Alabama, and sold to the husband of the defendant about the year 1840. That Young F. Bohannon, the husband of the defendant, in January, 1843, removed to the republic of Texas, and that said Young F. Bohannon remained out of the State until his death in June, 1843, and in December, 1843, said slave was again brought into this State, and so the plaintiff saith that no one who could be sued for this cause of action has been within the State, at any one time, or at several times together, for the period of six years, next before the commencement of this suit. To this plea there was a demurrer, which was overruled, and issue being joined, a verdict was rendered for the plaintiff.

In the course of the trial, a bill of exceptions was taken, which shows the following facts: The defendant answered interrogatories that had been filed, that her husband, Young F. Bohannon, bought said slave of Isaac N. Mallet, in the year 1840, and he held said slave as his own under said purchase, and that she received said slave from her husband's estate. The plaintiff then introduced a witness, Albert J. Mallet, who stated, that Isaac N. Mallet, who died in the year 1844, stated to the witness, whilst he was in possession of the slave, claiming him as his own, that he, Isaac N. Mallet, was with Randal Mallet when he took the boy off to Mississippi, in consequence of some agreement with Mrs. Clough, the plaintiff's intestate. That Randal Mallet stated, that Mrs. Clough was not at home at the time, but left a note, stating that he could take the boy under certain circum-

stances. That he never saw the note, and does not know its contents. The witness farther stated, that Isaac N. Mallet brought the negro back to Alabama, with some other negroes, (which he informed the witness belonged to the estate of Randal Mallet,) for the purpose of selling them, as the agent of Baker Mallet, the administrator of Randal Mallet, deceased. To these declarations of Isaac N. Mallet, the defendant objected, but the objection was overruled.

In reference to the plea of the statute of limitations, the court charged the jury, that the time during which there was no person in the State subject to be sued, should be deducted from the time that had elapsed from the accruing of the cause of action, and the commencement of this suit; and after deducting such time, if six years had not elapsed, from the time of the accruing of the cause of action, until the commencement of this suit, then the statute would not bar the suit; to which the defendant excepted.

The defendant requested the court to charge the jury, that if they believed that Mrs. Clough died in December, 1836, and that no person administered on her estate, until the 7th day of September, 1844, the statute of limitations is a bar to this action; which the court refused.

The defendant further requested the court to charge the jury, that if they believed that the negro was taken from the possession of Mrs. Mallet, with her consent, then it was necessary to prove a demand before this suit could be brought; which was refused, and the court charged, that the levying of the writ was a sufficient demand; to which the defendant excepted. These matters are assigned as error.

SAFFOLD, for the plaintiff in error, made the following points:

When the statute begins to run, the death of neither party impedes its operation. *Grice v. Jones*, 1 Stew. 254; *Johnson v. Wren*, 3 Id. 180; 1 Johns. Rep. 165; *Angel on Lim.* 57; *Wenham v. M. Ins. Co.* 13 Wend. 269; *Hansford v. Elliott*, 9 Leigh, 100; *Ruff, adm'r, v. Bull*, 7 H. & J. 14.

The exception of the statute being in avoidance of the common law, must be strictly pursued. *An. on Lim.* 215.

As to the admission of the testimony of the declarations of

the agent, he cited *Bliss v. Winston*, 1 Ala. 347; *Oden v. Stubblefield*, 4 Id. 42; *Dickerson v. Hodges*, 1 Porter, 100; *Betts v. Huntsville Bank*, 3 Stew. 22; *McBride and wife v. Thompson*, 8 Ala. 650; *Abney v. Kingsland*, 10 Id. 359; 2 *Philips's Ev.* 585; 1 *Greenl. Ev.* 126, § 110.

CROMMELIN & SEMPLE, contra.

To reverse this case, the plaintiff in error relies, viz: 1. On the statute of limitations. 2. That no special demand was made before commencement of suit. 3. That the statements of Isaac N. Mallet, while in possession of the slave, and claiming him as his own, were permitted to be introduced as evidence. But the positions of the plaintiff in error cannot be sustained.

1. The person in possession of the slave was the proper one against whom the action should be instituted. 1 *Chit. Plead.* 122.

2. Randal Mallet, who took the slave from Mrs. Clough, (the intestate of plaintiff below,) was passing out of the State, when he took the slave; and he remained out of the State, with the slave in his possession, until the death of Mrs. Clough. During this time the statute of limitations did not begin to run. *Clay's Dig.* 327, § 84.

3. The circumstance alone of there being no administration granted for the whole period provided as a bar, is not sufficient to bar the plaintiff of his right. *Fishwick v. Sewell*, 4 *Harris & Johns.* 428; *Haslett v. Glenn*, 7 Id. 17, 24.

4. If the statute commenced running when the slave was taken from the possession of Mrs. Clough by Randal Mallet, it could not be effectual. There was no person within this State subject to be sued during the whole period provided as a bar, or for such period, composed of different portions of time. *Smith's Adm'r v. The Heirs of Bond*, 8 Ala. R. 386.

5. The statements of Isaac N. Mallet being in possession and claiming the property as his own, were admissible as evidence to explain his possession. *Oden v. Stubblefield*, 4 Ala. R. 40; *Garey v. Terrell*, 9 Id. 206.

6. No special demand was necessary before commencement of suit. *Vaughn v. Wood*, 5 Ala. Rep. 304; *Bell v. Pharr & Beck*, 7 Ala. R. 807.

DARGAN, J.—The action of detinue is barred if not commenced within six years from the time the cause of action accrues. But the statute provides, “that if the person is, or shall be out of this state at the time the cause of action shall accrue, or during any time during which suit could be brought on the cause of action, then the person entitled to sue, shall be entitled to bring suit against such person, after his return into the State; and the time of such person’s absence, shall not be taken as a part of the time limited by the act.

It is evident the design of the act was, to allow the party entitled to sue, six years, within which time he must commence suit, and if he did not, he should be forever barred. But the six years are given here, within which he may sue in the courts of this state, and if we were to hold, that the statute is a bar for this debt, but would not be for her vendor, we should violate the evident intent of the act, for by such a construction, one month may not have elapsed, during which the plaintiff could have brought suit in the courts of this state; yet the statute would be a bar to his right to recover. The statute, when applied to property, real or personal, operates directly on the title, and when the bar is perfect, the adverse possessor has an indefeasible right. See 11 Wheat. 361; 7 J. J. M. 194; 5 S. & R. 236; Hill’s S. C. Rep. 299. Consequently, the vendee of such an adverse possessor, would have a perfect title. But the vendee acquires no better title under the statute of limitations, than his vendor had, nor can his title be protected by the statute, further than the same title would be in the hands of his vendor. The plaintiff in error can therefore defend herself under the plea of the statute of limitations, no farther than her vendor could, had he retained the adverse possession, and the suit had been against him. The court properly overruled the demurrer.

The bill of exceptions presents the following facts. The plaintiff introduced a witness, Albert J. Mallet, who stated that Isaac N. Mallet, while in possession of the slaves in dispute, as his own, told the witness, that he was with Randal Mallet, when he took the boy in dispute off to Mississippi, in consequence of some agreement with Mrs. Clough, the plaintiff’s intestate, that Mrs. Clough was not at home at the time.

but left a note, that Randal Mallet could take the negro under certain circumstances. The witness never saw the note, nor does he know its contents. He further stated, that I. N. Mallet brought the negro in dispute back to Alabama with other negroes, which I. N. Mallet informed him belonged to Baker Mallet, the administrator of Randal Mallet, and he had brought them as the agent of Baker Mallet to sell.

It appears also, that the slave in dispute was afterwards sold by Isaac N. Mallet, to the husband of the defendant, and that Isaac N. Mallet is now dead. The plaintiff in error contends, that the admission of these declarations of I. N. Mallet was erroneous.

The admissions of a party in possession are evidence of the character of that possession, and in the absence of other proof to contradict them, the property will be considered as held in the manner indicated by those admissions. But in order to make those admissions binding, they must be made by the party whose interest is to be affected by them, or by some one authorized to make them. See 2 C. & H's Notes to Phil. Ev. 558, note 452, and Greenl. Ev. 198, § 114.

Isaac N. Mallet admitted that he was the agent of Baker Mallet, for the purpose of selling the slaves, and whilst he had them in possession, the admissions above stated were made. Being then the agent of another, in respect to the property, the admissions do not affect his rights, for he has no right to be affected—and consequently they are inadmissible unless they form a part of the *res gestae*. To become a part of the *res gestae*, the declarations, or admissions, made by the agent, must be made at the time of doing some act in the execution of his authority, in respect to the property, that will bind his principal. See Greenl. Ev. § 113; Story on Ag. § 134-5-6-7.

The admissions of Isaac N. Mallet, which were allowed to go to the jury, were not made at the time of executing his authority, nor in connection with any act in reference to the property, and therefore are not admissible as part of the *res gestae*. If indeed he was not the agent of the administrator of Randal Mallet, at the time they were made—that is, if his agency had ceased, and he then held the slave as his own

property, a different rule of law would apply—but we cannot infer from the bill of exceptions, although we must construe it most strongly against the plaintiff in error, as he is the party excepting, that the character of the possession of I. N. Mallet, at the time of making the admissions, had been changed from an agency to actual ownership. The bill of exceptions states he was in possession of the property as his own, but at that time he admitted he had received the slave as an agent of Baker Mallet, and there is no proof to show how the slave ever became his. We are therefore constrained to look on the evidence as the admissions of an agent, and as such, are inadmissible. Let the judgment be reversed and the cause remanded.

SHELTON v. ARMOR, ET AL.

1. An instrument which on its face purports to be under seal, will be considered a deed, though a scrawl is omitted to be made opposite the name.
2. A certificate of probate of a deed which recites, that "W. E. acknowledged his signature to the annexed deed, to W. B., for the purposes therein mentioned," is not sufficient to authorize the registry of the deed, or the reading a certified copy as evidence.

Writ of Error to the Circuit Court of Mobile. Before the Hon. John Bragg.

TRESPASS to try title to a lot of land in Mobile, by the plaintiff in error against the defendant in error.

Upon the trial, as appears from a bill of exceptions, the plaintiff introduced as a part of his claim of title, a certified copy from the records of the Mobile county court of an instrument from William E. Kennedy to William Ball, dated

29th June, 1820, purporting to convey to him certain land in Mobile. The certificate of probate is as follows: "Personally appeared before me, Edward Hale, Esq., a justice of the quorum, for the county of Mobile, the within named William E. Kennedy, and acknowledged his signature to the annexed deed to William Ball, for the purposes therein mentioned."

The loss of the original was admitted, but the defendants objected to the reception of the paper as a deed from Kennedy to Ball, because it was not sealed, and the acknowledgment insufficient. These objections were sustained, and the plaintiff excepted.

The plaintiff also endeavored to sustain his cause by proof of entry and possession, and proved that Ball entered upon a part of the land mentioned in the deed in 1821, and built a house upon it, and occupied it by his tenants, and claimed the whole under the conveyance, but no part of the lot in controversy was in the actual occupancy of Ball. He also proved a regular chain of conveyances from Ball down to the plaintiff, the conveyance to the latter bearing date 29th October, 1835, but the land embraced in the declaration was never actually occupied or enclosed by Ball, or any other person, until the plaintiff occupied under the lease from Eslava.

The defendants, to prove their title produced a French grant to Madame de Lusser, dated in 1763. That in 1764, she conveyed lands embracing this lot to one Chastaing, which was re-conveyed by Chastaing to her son. The will of Madame Lusser in favor of her son. The death of this son and his devise to his brother. The death of the brother in 1791, and the descent of the property to two sisters. The conveyance of the undivided half of the property to the father of M. D. Eslava, the landlord of defendants, in 1808, by the heirs of one of the sisters. A partition of the property between M. D. Eslava, and the heirs of De Lusser, in 1824, and the allotment of the lands in the declaration to M. D. Eslava in that partition. The death of Eslava, and a partition among his heirs, in 1828. A lease of the property to the plaintiff in 1828, for six years and the holding the land un-

der that lease. The disclaimers of the plaintiff after the expiration of the lease, and the recovery in ejectment, in 1843. That the line of the heirs of Eslava did not touch the line of the land in the actual possession or occupation of Ball, or any one claiming under him, and that the heirs of Eslava occupied parts of the land, as did their father. It was proved that the title of Eslava, as assignee of Madame de Lusser had been confirmed by Congress, and a survey made to include the land, before suit brought.

Upon this testimony the court charged the jury, that the defendants had exhibited a better title than the plaintiff, and that he could not recover. To which the plaintiff excepted. These matters he now assigns as error.

P. HAMILTON, for plaintiff in error.

The principal point in this case is, that an instrument purporting to be a deed was offered in evidence by the plaintiff, as a part of his claim of title, and excluded by the court on the ground that it was not under seal, nor properly acknowledged before the officer certifying the acknowledgement.

In this case the deed is expressed upon its face to be under seal, but no scrawl is attached to the name of the grantor. The original deed however was lost, and the plaintiff had no means of proving the deed, except from the record. The proof of the loss of the original instrument was dispensed with upon the trial.

The instrument was acknowledged by the grantor to have been signed by him as a deed, for the uses and purposes therein mentioned.

It is true, in former times, a seal was regarded as the most solemn act a party could use to evidence his intention to execute a particular instrument. More recently however, this has been regarded as much more immaterial—first, a scrawl or scratch of the pen was regarded as a sufficient substitute, and now it has been declared by the legislature, that nothing but the signature is necessary.

In our state the acknowledgement before an officer specially authorized, seems to have been for years the principal thing to be looked to, and in this instance every thing essential was acknowledged before such an officer.

In addition is the fact, that there was evidence tending to show, that within about a year after the execution of the deed, the grantee was in possession of a part of the tract, of which that in the deed formed a part, and was conveyed regularly down, &c.

We have nothing but a copy of the original instrument, and it is quite likely that the original deed may have contained a scrawl, which was omitted by the clerk in copying.

As to any defect in the form of the acknowledgment, subsequent statutes have cured all such defects, even supposing that any ever existed.

J. A. CAMPBELL, contra.

The instrument offered in evidence was not good as a sealed instrument. *Adkins v. Lee*, 1 Ala. Rep. 187; 3 Ala. Rep. 145.

It was not admissible as a copy of a recorded deed under the registry acts. On its face, it was not a deed. 2. The acknowledgment did not conform to the requisites of the statute in force at the time. There is no acknowledgment of sealing or delivery. *Toulmin's Dig.* 246; *Clay's Dig.* 153.

It was competent for the defendants below to have resisted the evidence offered in any shape, without supplementary proof. None was offered in this case. The registry acts do not authorize the admission of recorded deeds, unless the acknowledgements conform substantially to the requirements of the statutes. *Fipps v. McGeehee*, 5 Port. 413; 2 Hill & Cowen's Notes, 1243; 2 Lomax Dig. 371.

There was no evidence to increase the force of the paper offered. It was offered simply as a recorded paper. The court passed upon its legal effect as a recorded paper. The facts apparent on the face of the deed, show its insufficiency as such a paper.

If the plaintiff desired to prove that a deed existed, he should have offered additional evidence. The certificate of the justice of the quorum is not evidence for any purpose, unless it was sufficient as a statutory certificate. The certificate that a party had acknowledged the signature to a deed, is not evidence of the "signature." A certificate in

conformity with the statute, authorizes the admission of a deed to record, and gives efficacy to that record as evidence in case of the loss of the original. If the deed was not properly admitted to record, the certificate is without any force as evidence of the facts it contains. See cases above cited.

In this case, the officer himself, or the subscribing witnesses, should have been produced to prove the facts. The insufficient efforts of an officer to do an official act, cannot be received as if those efforts had been effectual.

The title of the defendant was the best. The recovery of the land from Shelton, under the judgment of the supreme court destroyed the effect of all presumptions in favor of possession, supposing Ball to have entered on this lot. *Whitney v. Wright*, 15 Wend. 171; *Jackson v. Tuttle*, 9 Cowen, 233; 6 Ib. 757.

The title produced by the defendants was best, and his possession of this lot was earliest. The constructive possession of lands embraced in two claims, will be regulated by the title. The plaintiff in this suit did not hold adversely to the defendants at any time. *Shelton v. Eslava*, 6 Ala. R. 230; *Den ex dem Corson v. Mills*, 1 Dev. & B. 546. The first actual possession of the lot was by Shelton, under the title of the defendants. This is the only title derived from the government.

It will be noticed that the paper of Mr. E. Kennedy was actually admitted to go before the jury. Its legal effect as a deed, was only denied. Its legal effect was not strengthened by proof of a continuous, or of any possession under it, of the land in dispute.

CHILTON, J.—The view which we take of this case renders it wholly unnecessary to institute an inquiry into the character of the defendant's title to the lot sued for. Whether he had any title was a question of no importance until the plaintiff had made out such title as would enable him to sustain the action; for the familiar rule requires, that the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary.

Did the plaintiff show such title as would authorize a recovery? All the conveyances which were offered and read

to the jury, could avail him nothing, as these depended for their validity, as respected the transmission of title, upon the deed from William E. Kennedy to Ball, which had been excluded from the jury, and as he never had the actual possession of the lands, nor had any one from whom he claimed ever been so possessed, he was necessarily thrown upon documentary evidence of title. The question then turns upon the exclusion of Kennedy's deed to Ball; for with that deed properly in evidence, we are not prepared to say that the plaintiff would not have made out such a *prima facie* case in connection with his other proof, as to have required the exhibition of a paramount title on the part of defendant. In respect to the first objection made to the admission of the deed, that it was not a sealed instrument. The statute requires the courts to carry out the intention of the parties, by giving the instrument which imports on its face to be under seal, the same effect as though a scrawl had been added. Clay's Dig. 158, § 41. So that the deed could not have been properly excluded on that ground.

The other ground of objection to its admissibility was well taken. The certificate does not comply with the requisitions of the statute, a substantial compliance with which is essential to its validity. This was the decision in Phipps v. McGehee, 5 Porter's Rep. 413, which decision is approved in Brock v. Headen, *supra*, 370. See the authorities collected in Phil. Ev. C. & H's Notes, §74. The certificate in this case merely recites that the grantor appeared and acknowledged the certificate to be his, but whether the deed was by him sealed or delivered, or when he signed it, is not stated, thus omitting every essential requisite of the statute. Dig. 152, § 7. The copy of the record in some cases is proper evidence, in connection with other proof, to establish the contents of a lost instrument, although such record may not have been made upon a valid certificate; as, where it is shown to have been compared with the original, it may be admitted, not as a record, but as a sworn copy of the original. Winn v. Patterson, 9 Peters's Rep. 666. But the copy deed in the case before us was offered as a recorded instrument, aside from all other proof, and as such was clear-

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ly inadmissible. See *Blight's Heirs v. Banks*, 6 Monroe's Rep. 196 ; *Barger v. Miller*, 4 Wash. C. C. Rep. 280.

The deed from Kennedy to Ball out of the case, it is manifest Ball had no title to the lot in controversy, which would have enabled him to recover, and could transfer no greater title than he had. Having shown no documentary evidence of legal title, there could be no constructive possession, and as he never had actual possession of the lot sued for, he is left, so far as the evidence discloses, wholly without title. It is not shown that Ball, in possessing himself of one part of the lot embraced in his deed, intended it as a possession of the whole, but it is said he claimed the lot now sued for, the lines of which do not touch the part he had in actual possession. Under these circumstances, we are of the opinion that he failed to make out his case, and the instruction of the court below to the jury, was correct.

Judgment affirmed.

DARGAN, J., not sitting.

LOGAN v. LOGAN, ADM'R.

1. The widow can claim nothing from advancements made by the husband to his children, and by them brought into hotchpot.
2. When the decree made by the orphans' court, gives to the widow the benefit of the advancements made to the children, and this fact appears in the decree itself, the error may be revised in the appellate court, without a formal exception to the action of the orphans' court.

Writ of Error to the Orphans' Court of Greene.

UPON the settlement of the accounts of the defendant in error, the court made a decree, ascertaining the sums

to which the widow, and the distributees were severally entitled. Subsequently, a motion was submitted to the court, by two of the distributees, acting for themselves and the other distributees, to amend the judgment *nunc pro tunc*, by the record, and for the rendition of decrees for the proper amount. The orphans' court refused to amend the decree, which is the matter now assigned for error.

The error insisted on in this court, was, that the judge of the orphans' court, in ascertaining the share of the widow, gave her the benefit of advancements made to the children, and which they had brought into hotchpot. The record disclosed all the facts on which the settlement was based.

A. GRAHAM, of Greene, and HALE, for the plaintiffs in error.

1. The distributive share of the widow is not increased by the children bringing the advancements made to them into hotchpot; she is only entitled to her share of the personal property of which her husband died possessed; exclusive of the advancements made. 1 Eq. Cas. Ab. 155, § 6, 7; 2 Id. 270, § 29; 2 Williams on Ex'rs, Am. ed. 1070; Lord Kircudbright v. Lady Kircudbright, 8 Vesey, 64; Lawton's Case, 3 Desaussure's Rep. 199; Stearns v. Stearns, 1 Pick. 157; Brunson v. Brunson, 1 Meigs's Tenn. Rep. 630; Clay's Dig. 173, § 4; Id. 197, § 25-6; Id. 191, § 1.

2. When the court rendering a judgment, refuses to correct an error apparent on the record, this court will correct the error at the defendant's cost.

J. B. CLARK, for the defendant in error.

1. The share of the widow was one fifth of the whole personal estate after the advancements were brought into hotchpot. Clay's Dig. 173, § 4; Ib. 197, § 25; 1 Rev. Stat. of No. Ca. 615, § 12; Ib. 368-9, § 1 and 3; 2 Wms. on Ex'rs, 906-7, 918; Davis v. Duke, No. Ca. Conf. R. 439, Lib. ed.; Littleton v. Littleton, 1 Dev. & B. Law R. 327.

2. An improper allowance to one of the distributees in the orphans' court, cannot be corrected on error unless excepted to in that tribunal.

COLLIER, C. J.—The first question presented for our

consideration is, whether the distributive share of the widow is increased by the advancements of the children of the intestate, which were brought into hotchpot. It is provided by the act of 1826, that where the husband dies intestate, or there shall be no satisfactory provision made for the widow by will, she shall share in the personal estate, as follows: "If there be no children, or if there be but one child, she shall be entitled, out of the residue left after paying the debts of the deceased, to one half: if there be more than one child, but not more than four, in that case she shall be entitled to a child's part; but if there be more than four children, then, and in that case, she shall be entitled to one fifth part in absolute right." Clay's Dig. 173, § 4. The act of 1822, "concerning intestates' estates," enacts that "when any of the children of a person dying intestate, shall have received from such intestate in his or her lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition of the estate with the other parceners, such advancement, both of real and personal estate, or the value thereof, shall be brought into hotchpot with the whole real and personal estate descended, and such party bringing into hotchpot such advancement as aforesaid, shall thereupon be entitled to his, her, or their portion of the whole estate so descended, both real and personal." Clay's Dig. 197, § 25. By the act of 1828, "concerning the estates of deceased persons," it is provided how property brought into hotchpot shall be valued, and declared that in all cases, the value of the property at the time it was delivered, shall be the standard of value; "and the value so fixed, or the value agreed upon by the parties, shall be deducted from the share of such heir or heirs." Ib. § 26.

The English statute of distributions of 22 and 23 Car. II, c. 10, prescribes the manner in which the estate of a person dying intestate shall be distributed between his wife and children, or the representatives of his children, and provides that advancements made to any of the children by the intestate, shall be taken into the account, if those thus advanced shall claim a share in the estate, so as to make the portions allotted to the children, or their representatives, equal as near as may be. 2 Wms. Ex'rs, 906. It is said. "the end and

intent of the statute was to make the provision for all the children of the intestate equal, as near as could be estimated." And "it may not be amiss to observe, that with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland: and with regard to the lands descended in coparcenary, that it has always been, and still is, the common law of England, under the name of *hotchpot*." 2 Id. 917, 918. Under this statute, it has been held, that a child advanced in part, shall bring in his advancement only among the other children: for no benefit shall accrue from it to the widow. Id. 919, 949; 2 Step. Com. 255; 8 Ves. Rep. 51.

Under the statute of South Carolina, for the abolition of the rights of primogeniture, and the equitable distribution of intestates' estates, it has been decided that the widow is not entitled to the benefit of an advancement made by a father to a child, and which the latter brings into *hotchpot*, but it is only to be taken into the account in adjusting the shares of the children. The court said that by a recurrence to the act, it will be found, that the rights of the widow are confined to the property left by the intestate husband. The words of the act are, "that when any person possessed of, interested in, or entitled to real estate in his or her own right in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner: first, if the intestate shall leave a widow and one or more children, the widow shall take one third of the said estate, and the remainder shall be divided between the children, if more than one: but if only one, the remainder of the estate shall be vested in that one absolutely forever." The same provision is extended to the personal estate of intestates. It is added, that the act is clear and distinct. "The widow is to take a third of whatever estate the intestate is possessed of, interested in, or entitled to, at the time of his death, and no more or other estate. Nor does the first recited clause, making provision for the case of children who had been advanced, have any relation to the widow: that was intended merely as a rule of equalization among the children. The widow is to take, in all events, a third of what is left, and the children

the remaining two thirds." *Ex parte* Lawton, 3 Dess. Rep. 199.

The statute of Virginia of 1785 provides, "where any of the children of the intestate, or their issue, shall have received from the intestate in his lifetime, any real estate by way of advancement, and shall choose to come into partition with the other parceners, such advancement shall be brought into hotchpot with the estate descended." Another enactment of that State directs, "that where any children of the intestate, or their issue, shall have received from the intestate in his lifetime, any personal estate by way of advancement, and shall choose to come into the distribution with the other persons entitled, such advancement shall be brought into hotchpot with the distributable surplus." Judge Tucker was of opinion that these statutes must receive the same construction as the English statute, and the widow could not claim any benefit from the advancements to the children brought into hotchpot; notwithstanding the expressions in the Virginia acts referring to the advanced child coming into partition with the other parceners and distributees. 2 Lomax on Ex'rs, 213, § 14; 1 Tucker's Blacks. pt. 2 p. 176.

The statute of North Carolina, passed in 1784, provides for children partially advanced in the lifetime of their deceased parent, bringing into hotchpot their advancements if they wish to share in the distribution, and entitles *in totidem verbis* the widow to a "child's part," "equally with all the children;" unless there be more than three children, in which case she shall be entitled to one third of the personal estate, &c. This enactment, it has been held, should receive a construction different from that of *Charles the Second*; that it extends to the widow the principle of equality which was before confined to the children, and in all cases where there are two or more children, entitles her to share the personalty equally with them. This was considered evident from the expression, a "child's part," which, *ex vi termini*, imports as large a share as is allotted to any child. No. Caro. Conf. Rep. 439; 1 Dev. & Bat. Law Rep. 327.

It must be conceded, that the statute of North Carolina, in respect to the share of the widow, is expressed in terms in

some respects dissimilar to the 22 and 23 Charles. In the opinions of its highest court, which expound it, there is much force, and we have no inclination to find fault with the reasoning employed. We would however remark, that the same statute was differently interpreted by the supreme court of Tennessee in *Brunson v. Brunson*, Meigs's Rep. 630.

Our act of 1826, we have seen, declares the widow's share in the estate of her deceased husband, which shall be left after the payment of his debts, and the previous statutes of distribution of 1806 and 1812, only operated upon the surplus. The statute of 1822, which we have cited, only requires the children of the intestate to bring their advancements into hotchpot, where they "shall choose to come into the partition of the estate with the other parceners." What is said in the act of 1826 in respect to the widow being entitled to "a child's part," where there are not more than four children, is restricted by the preceding part of the section, to "a child's part," or in other words, to one fifth of the decedent's estate which may remain subject to distribution after his debts are paid. This conclusion is not attained by an application of the principles of construction, but is the clear result of the language employed.

The act of 1822 was doubtless borrowed from the statute of Virginia, which seems never to have received a judicial exposition by the court of appeals of that State. But the well deserved reputation of Judge Tucker, both as a man and a jurist, induces us to think that the practical interpretation of the statute referred to, has conformed to what he supposed should be its legal construction.

The term "parcener," which is an obsolete term in our jurisprudence, was doubtless inserted in our act without any definite or precise view, but merely because it had been previously used in the Virginia statute. By parceners, according to the English law, are meant the daughters of a man or woman seized of lands and tenements in fee simple or fee tail, on whom, after the death of such ancestor, such lands and tenements descend. 2 Bouvier's L. Dic. 261. See also 1 Step. Com. 319. An analogical, as well as critical, interpretation of the words "other parceners," in the connection in which they are found, evidently mean the other children of

the intestate, or those representing them, who have not received advancements, and with whom those advanced come in, to share in the distribution. The term "other," antecedent "parceners," can refer to no other object than "children;" and we therefore conclude that "parceners" was used as the synonyme with "children." If this conclusion was regarded as at all doubtful, the aid of analogous statutes, and the interpretation they have received, both in this country and England, we have seen might be successfully invoked to strengthen it. We will not extend our remarks on this point; for if we are to follow the light of precedent, we are constrained to conclude, that the widow can claim nothing from advancements made by her husband to his children. See 1 Pick. Rep. 157.

It is insisted for the defendant in error, that as the distributees did not except to the decision of the orphans' court, which gave to the widow of the intestate the benefit of the advancements to the children, they cannot avail themselves of it as an error here. The fact is explicitly shown in the decree by which the intestate's estate was distributed and the administration settled; and this being so, we have repeatedly held that no formal exception was necessary to authorize the appellate court to revise an error apparent in the final action of the orphans' court. Where the record discovers no express or implied waiver of an irregularity, it cannot be intended, that the judgment or decree was made by consent.

We might perhaps lay out of view the fact that the distributees, or some of them, moved the orphans' court to correct its decree in the particular complained of, and that this motion was overruled before the writ of error was sued out. For we are inclined to think, that the error noticed is not a clerical misprision, which the party aggrieved should have sought to have corrected in the primary court, before he appealed to a higher tribunal for redress.

We have but to add, that the decree of the orphans' court is reversed, and the cause remanded.

WILKINSON, ET AL. V. HARWELL.

1. When an agent sells land in the name of his principal, without authority to bind the principal, and the principal on being informed of the sale refuses to ratify and confirm it, the vendee may abandon the land, and the principal cannot, by afterwards offering to confirm it, enforce the contract.

Error to the Chancery Court of Macon. Before the Hon. W. W. Mason, Chancellor.

HARWELL filed his bill against Wilkinson, Woodruff and Glenn, alledging, that on the 19th July, 1839, Glenn informed him that Woodruff was the owner in fee of many valuable tracts of land, in Macon county, and that he, Glenn, was his authorized agent to make sale of the same; and complainant being desirous to purchase, and believing the statements made by Glenn, he entered into a contract with him, as such agent, and purchased the south half of section 8, township 14, range 26; and also, the west half of the south-west quarter of section 9, in the same township and range, for the sum of \$3,000—the first thousand to become due the first of January, 1840; the second, the first January, 1841; the third, first January, 1842; and executed and delivered to the said Glenn his three notes accordingly. That the said Glenn, as the agent of said Woodruff, executed and delivered to the complainant, in the name of said Woodruff, a bond, in the penal sum of \$6,000, conditioned to make titles for said land, to said complainant, upon the payment of the purchase money. That complainant entered into said contract under the belief that Glenn was the duly authorized agent of Woodruff, to make sale and to execute title bonds, and that Woodruff was lawfully seized in fee of said land, free of all incumbrances. Thus confiding, complainant went into possession, and erected comfortable buildings, and made improvements.

That just before the first note fell due, complainant met with Woodruff, and proposed to give him the bond executed in his name by Glenn; and to receive one from Woodruff himself, with the like condition, but that Woodruff refused, because Glenn had sold the land for less than he was authorized to sell it; but on an interview with Glenn, complainant was induced to believe, that Woodruff would carry out the contract, but Glenn informed him that Woodruff refused to accept the notes. That about the time the first note fell due, he was prepared to pay it, but understood that Woodruff had mortgaged the land to a company in Liverpool, and seeing Woodruff, he informed complainant that it was so. That he had never authorized Glenn to execute such a bond, that he considered it no sale, and that complainant was authorized to cancel it. That Woodruff further stated, that he had never given Glenn any written authority to sell the land. That at one time he verbally authorized him to sell the lands, but limited him as to the price at which he should sell, and that the price agreed to be given by complainant was much less than the limits prescribed to Glenn, and that since that interview, complainant looked upon the contract as ended, and from thence he considered that he was occupying at the will of Woodruff.

The bill also alleges, that complainant informed Glenn of what had passed, and gave him up the bond, and demanded the notes; that Glenn accepted the bond, but did not give up the notes. The bill also states, that the bond was afterwards placed in his bureau, without his knowledge or consent. That the land would have sold for a profit in 1840 and '41, but is now greatly depreciated in value. That in 1843, being threatened with a suit by the agents of Wilkinson, he agreed to abandon, and did abandon the premises, in the fall of 1843, and has not occupied them since.

The bill also alleges, that Woodruff is now insolvent, and unable to make a good title to the land. That suit has since been commenced in the circuit court of Macon, on said notes, in the name of Woodruff, for the use of Wilkinson, against complainant. He prays a perpetual injunction against said

suit; that the notes be cancelled and given up, and the contract be rescinded.

The bill is taken as confessed against Glenn. Wilkinson answers the bill from information and belief. He states, that Glenn, as the agent of Woodruff, made the contract, that he had authority to do so, and that Woodruff never repudiated it. That he is the agent of the firm in Liverpool, to whom the lands were mortgaged, and that he has full power over the mortgage, and offers to release it on the payment of the money. That Woodruff was lawfully seized in fee, and has never agreed to a rescission of the contract. That he never threatened the complainant with a suit, for the recovery of the land, nor did his attorney.

Woodruff answers, and states, that complainant purchased the land of Glenn, as described in the bill. That the land sold complainant was a portion of a large tract purchased by James N. Bethune, and respondent, of Eli S. Shorter, and that Shorter transferred the receiver's certificates to the respondent, and respondent and Bethune executed their notes to Shorter for the purchase money. That soon after said purchase, said Shorter died, and James O. Shorter was appointed administrator. That in 1837, some of the purchase money becoming due, the lands were transferred to one Hargrove, as a trustee for all parties, but with a reservation of the right in said defendant, to sell any of said lands, paying over the proceeds to said administrator. That the estate of said Shorter being largely indebted to T. M. Smith & Co., merchants of Liverpool, it was agreed that the administrator should transfer the notes of defendant and Bethune, in part payment. That the deed given to Hargrove should be cancelled, and that defendant and Bethune should execute a mortgage on all of said land, in favor of said firm, to secure the debt, which they accordingly did, on the 5th day of April, 1838, the debt being upwards of \$45,000; which deed of mortgage contained a reservation of power, authorizing said Woodruff, or Bethune, to sell said lands, upon paying the purchase money, or proceeds, over to said mortgagees. The answer further states, that soon after the sale by said Glenn, the said defendant approved of it, and has never at any time disavowed it: and that he explained to complain

ant the situation of the title and mortgage, before the first payment fell due, and he appeared satisfied with it. That he has often applied for payment, but has been put off with promises. That complainant applied to Wilkinson, for a bond for titles, and that Wilkinson promised to give him a bond, when he would make a liberal payment on the purchase, and never heard of any difficulty on the subject, except that complainant could not procure the money. That all the lands under the mortgage were sold in 1842, or 1843, except the lands sold to complainant.

The answer further states, that he, the defendant, never denied the agency of Glenn in selling the land; that the land was sold for less than he had authorized Glenn to sell it for, but that he approved the sale, and never authorized Glenn to give up the notes to complainant, or said any thing that would justify complainant in giving up the bond, nor does he know that he ever did give it up. He knows nothing of any agreement that complainant should abandon the land, and, by way of explanation, says, that the sale made to Hargrove was cancelled simultaneously with the execution of the mortgage.

George Pickett, a witness examined by complainant, says, that he knows the land, and the improvements put upon it; that they are worth about \$1200; that the value of the land, in 1840, was about eight or ten dollars per acre; in '44 about seven; that complainant resided on the land until December, 1843, and then removed from it. That he knows nothing of the contract but what he has heard. That in a conversation with Woodruff, he heard Woodruff say, that he did not intend to abide by the contract made by Glenn, as he had exceeded his instructions, and was not a legally appointed agent; and in a subsequent conversation the witness had with Woodruff, in reply to a question, why he did not sue on the notes, as they were due, he said he did not expect Harwell would pay, that he would get tired and move, and that the improvements would pay for the time he occupied it; and that he, Woodruff could not make titles. That these conversations with Woodruff were in 1842. He also states, that he heard Woodruff say, he was broke.

McKinley, a witness, states, that 100 or 125 acres are

cleared, and values the improvements at \$1200. That Harwell resided on it from 1840, to December, 1843, and no person has lived upon it since. That in 1840, such land was worth nine dollars per acre, without any improvements, and in 1846, not more than five dollars per acre. He knows nothing of the purchase, but heard Woodruff say, that Glenn had come under the limits, and that he would not abide by it. Does not recollect the year he heard Woodruff say this. Woodruff is insolvent, and was in 1840.

Fields, another witness, knows the land, and it has depreciated since 1840. Woodruff told this witness in 1841, that he had verbally authorized Glenn to sell the lands for a certain price; but that Glenn had sold them to complainant for less than he was authorized, and that he, Woodruff, was not legally bound to stand to the trade; yet he was willing to make titles, when complainant paid for it. Witness does not know complainant abandoned it.

The court rendered a decree cancelling the contract, and perpetually enjoining the suit on the notes.

From this decree the respondents prosecuted a writ of error to this court.

CAMPBELL, for plaintiff in error.

The bill is filed by Harwell to cancel the notes given by him on a contract for the purchase of land of one Woodruff. The bill sets out two grounds: 1. That the contract had been canceled. 2. That Woodruff's title was defective in this, viz: that he had mortgaged the land to W. D. Wilkinson and to George Hargrove.

The first ground is the one mainly relied on, and has been fully argued in the briefs on file.

The second ground is answered as follows: Wilkinson, who holds the mortgage for the land, is a defendant to the bill, and is the holder of the notes, and offers to confirm the sale.

This mortgage to T. W. Smith & Co. contains a reservation of the power of Woodruff or Bethune to sell the lands, and to pay over the proceeds to Smith & Co.

Smith & Co. and Wilkinson are identical in interest.

In regard to the deed to Hargrove, Wilkinson asserts in

his answer, that Hargrove never accepted or acted on it, and that it was rejected by him, and that he is willing to release it.

These being the facts, the existence of an outstanding title in Bethune does not appear from the bill; and even if such outstanding title did exist, it could not be established. The allegations of the bill do not authorize the proof of such a deed. 3 Ala. R. 421. There is, however, no difficulty on this point when the earliest mortgage—the mortgage to Wilkinson, is examined. That mortgage contains a reservation of a power to each of the parties to sell the lands embraced by it. To this deed Bethune is a party.

The conveyance to Hargrove is treated on all hands as of no validity. It was made while Harwell was in possession of the lands under a contract of sale, and consequently, if Hargrove had paid for the land, his title would not have prevailed over the prior equity of Harwell. Wilkinson states in his answer, that this title is worthless, and offers to procure it.

Under these facts, I submit that the chancellor should have pronounced a decree, declaring that no rescission of the contract had taken place, but that the same was binding, and if the plaintiff desired it, to direct a reference to the master, to inquire whether Wilkinson and Woodruff were able to make perfect titles to the lands, and if so, the decree should be reversed.

G. W. GUNN, contra.

DARGAN, J.—A court of equity will not enforce the specific performance of a contract, unless it be mutually binding on both parties; and if one party is not bound by the contract, the other may disavow it, and a court of equity could not enforce it. See 6 Leigh's Rep. 175; 6 Paige's R. 288; 2 Bibb, 98; 1 Humphries, 294. This being the rule of law, the first question is, was Woodruff bound by the bond executed in his name by Glenn? The answer states, that Glenn had exceeded his authority in selling for less than he was authorized to sell for, but admits he was authorized to sell, but whether his authority was conferred by parol, or under seal,

is not stated. But it is shown by the testimony of Fields, that Woodruff said, he had verbally authorized Glenn to sell the land. Under these circumstances, Woodruff was not bound by the bond on the day, or at the time it was executed and delivered: First, because Glenn, the agent, had exceeded his authority in selling for a less price than he was authorized. And secondly, because his authority being merely by parol, he could not bind his principal under seal, and thereby Woodruff was not bound as by a bond, and the contract was that Woodruff should be bound by bond. There was then no mutuality in the contract, at the time it was executed. Has it been ratified, and confirmed by the defendant Woodruff? or did he do it, upon being informed of the contract and its terms?

The answer states, that in a short time after the sale was made, he (Woodruff) ratified and approved of it, although Glenn had sold the land for less than he had been authorized to sell for. But the proof does not corroborate the answer; on the contrary, Pickett states, that in the year 1842, he heard Woodruff say, that Glenn had exceeded his authority, and that he would not abide by the contract; and in another conversation, he stated as a reason why he did not proceed to collect the notes which were all due, that he did not expect Harwell would pay them, and that he would get tired after a while and move off, and the improvements would pay for the time he occupied it. McKinsly, another witness, heard him say, that Glenn had come under his limits, and that he would not abide by the contract. Fields, another witness, heard him say in 1841, that he had verbally authorized Glenn to sell the land, but that Glenn had sold the land for less than he was limited to sell at, and that he (Woodruff) was not legally bound to stand to the trade, yet he was willing to make titles, when the money was paid. Even the testimony of Fields, which is the most favorable to the defendants, does not show that he (Woodruff) admitted a legal liability on the bond, but after denying his legal liability, he merely adds, that he was willing to make titles, when the money was paid. But in 1842, he stated to Pickett, as the witness deposes, that he would not abide by the contract.

From this testimony, we cannot come to the conclusion of

fact, that Woodruff, the defendant, on being informed of the contract, and its terms, ratified and approved of it, in a manner to bind him by the bond, thereby giving mutuality to the contract, and legal liabilities and rights to each party; and although he now admits by his answer that he did, yet he cannot now ratify it, and thus take advantage of the rise, or fall, in the price of land, and thereby speculate on a contract to which he was a party, and if an advantageous one, he would be bound by it—if not, he would not be bound. And as the testimony shows, that he denied he was bound by the contract in 1842, and according to the answer, was not bound by the bond at the date of its execution, his assertion in his answer, that he did approve of the contract, without proof showing when and how he did it, cannot now be received as evidence of a confirmation of the contract; more especially, as the value of the lands has greatly depreciated, and have been for several years abandoned by complainant.

The bond was not binding on Woodruff at the date of its execution, and he did not *ratify and confirm* the contract on being informed of it, and it is now too late for him to do it by his answer. The consequence is, there is a want of mutuality in the contract, and we can see no error in the decree. It must be affirmed.

BENFORD v. DANIELS.

1. Administration being granted upon an estate in 1840, the administrator continued to act until 1847, making annual sales by order of the court, and in 1846 applied for an entry *nunc pro tunc*, authorizing him to keep the estate together, under the act of 1835. Held, that as there was no record evidence that the original order was to keep the estate together, and as all the inferences from the conduct of the administrator, in the ad-

ministration, were, that he was acting under the general law, the court had no power to make such an order *nunc pro tunc*.

2. Although an administrator acting under a misapprehension, has incurred expenses in keeping up a farm, rearing the infant children, expending his own labor, &c. &c., he cannot be relieved in the orphans' court, but the distributees may elect, whether they will take the profits of the business, or proceed against him for the rent of the land, and use of the personal property. Whether he could not have relief in another *forum—quere*.

Writ of Error to the Orphans' Court of Dallas.

THE defendant in error, moved the orphans' court, to amend the original order, made six years previously, so as to authorize him to keep the estate together, under the act of 1835, which motion the court allowed, though there was no evidence of record that such order had been originally made. The plaintiff in error also objected to the compensation allowed the administrator. The facts sufficiently appear in the opinion of the court.

The assignments of error present these matters for revision.

G. R. EVANS, for the plaintiff in error.

1. An order, or judgment *nunc pro tunc*, must be predicated upon matters of record, or some memorandum of the court, and cannot be made on parol evidence. *Thompson v. Miller*, 2 Stew. Rep. 470; *Brown v. Bartlett*, 2 Ala. R. 29; *Armstrong v. Robinson and Barnwell*, *Ib.* 164; *Andrews, adm'r, v. Br. Bank at Mobile*, 10 *Ib.* 375; *Moody v. Keener*, 9 *Porter*, 252.

2. The duty of the administrator is, to receive the assets of the estate, to pay the debts of the deceased, and to pay over the residue, if any, to those entitled. *Willis, adm'r, v. Heirs of Willis*, 9 Ala. 336. He has no authority, unless authorized by the will, or order, to keep together the estate, and work the slaves on the plantation, if he does so, it is at his own risk. *Steele v. Knox*, 10 Ala. 608. He cannot bind the estate by his contracts, and all expenditures by him, in his attempt to continue the plantation, are upon his own ac-

count, and not chargeable upon the estate. Sumner v. Williams, et al. 8 Mass. Rep. 199; Forster v. Fuller, 6 Ib. 58; Brewster v. Brewster, 8 Mass. 131; Washburn v. Hale, 10 Pick. 429.

3. A trustee can secure no personal advantage to himself, by reason of his trust, and least of all will he be allowed to keep up a plantation and employ himself as the overseer. Jenkins v. Hanahan, 1 Cheve Ch. Ca. 129.

4. Notwithstanding the rule, that a trustee shall have no allowance for his services, (Lewin on Trusts and Trustees, 438-9,) our courts, as well as the courts of other states, have so far departed from the rule, as to allow reasonable compensation in the way of commissions to executors, &c. The general rule is five per cent on actual receipts, and more frequently below than above that amount. Granberry v. Granberry, 1 Wash. 246; Taliaferro v. Minor, 2 Call. 190. More than five per cent ought not to be allowed, except under peculiar circumstances. Triplett's Ex'r v. Jameson, 2 Munf. 242; O'Neil v. Donnell, 9 Ala. 934; Harris v. Martin, Ib. 895. See also, Pennsylvania and Maryland cases.

J. W. LAPSLEY and FELLOWS, for defendant in error.

In this case, all the questions are raised by the bills of exception, of which there are two, each of which presents but a single question.

I. Is there error to reverse the case in granting the order *nunc pro tunc*?

1. The order was regular. The record evidence alone pointed clearly to the keeping the estate together, under the ten years law; the leave granted annually to sell the cotton, and the receipt of the account sales by the court, establish that the judge had granted leave to keep up the plantation, in place of settling the estate at once. At any rate, the record evidence, when aided by the very explicit and satisfactory parol evidence, was sufficient to warrant the order. In many cases, the record has been aided by parol; in fact without such aid, very few *nunc pro tunc* entries could be made. Clay's Dig. 322, § 55; Moore v. Horn and Bouldin, 5 Ala. 234; Moody v. Keener, 9 Porter, 252, 256.

2. But if the order to amend the record was irregular, it cannot reverse, for it was immaterial, and could not affect the rights of the parties under the proof in this case. According to the exact terms of the act, the proof shows beyond all question, that the judge did authorize and permit the administrators, on application made, and good cause shown, to keep the personal estate together, and exempt from sale ; and that the administrator did act under and execute this authority. The act does not require any entry of this permission, nor any modification of the letters. As to the form of the bond, &c., that part of the act is merely directory, and the permission of the judge to require or take the bond, or to require annual settlements, would not destroy or vitiate his action in permitting the estate to be kept together. Clay's Dig. 198, § 31-2-3.

The permission was given, and the estate in fact kept together, under the permission, for years, without objection, and it would now be most unjust and oppressive to make the administrator accountable for what can at most be merely a clerical omission.

II. The second point presented by the second bill of exceptions is, was the allowance to the administrator excessive ?

The allowance was for overseer's wages, as well as his compensation as administrator, and expenses, and the bill of exceptions shows, that the judge adopted the very lowest estimate, and might, without error, have allowed much more, and he should in fact have allowed annual interest on his services, which would have made it much more favorable to the administrator. 9 Ala. 734, 895 ; Philips v. Thompson, 9 Por. 664.

CHILTON, J.—But two points are presented for consideration by the record. The first is, did the judge of the orphans' court properly allow the amendment of the record to be made *nunc pro tunc*, so as to show the administration was under the law authorizing the estate to be kept together for ten years—the second, whether the compensation allowed the administrator was greater than the law authorizes

To one or the other of these propositions, the various assignments of error may be reduced.

By the act of 1815, (Dig. 198, § 30, *et seq.*) the judges of the several county courts are authorized, on application made, and good cause shown, the by administrator of an estate, to keep the personal estate of the decedent together, and exempt from sale for any length of time, that they may deem advisable, not exceeding ten years. In such event, the administrator is required by law to make annual returns of the manner in which such estate has been managed, the crops made, the expenses incurred, and the disposition of all monies received from the estate, and if he fail to do this, the court is required to issue an attachment against him to compel its performance. In addition to the foregoing duties, he is required to keep a regular account of all monies appropriated, or expended, for each and every person entitled to distribution of the estate, and to make annual returns of the same to the judge. To secure the performance of these duties, the judge is required to take a bond with sufficient security, conditioned for their performance by the administrator. In this case, letters of administration were granted to the defendant in error, on the 4th Nov'r, 1840, and at the same time the court granted an order of appraisement, and for the sale of the personal property. A portion of the personal property was sold, as appears from the inventory of sales, and orders were made from time to time by the court, authorizing the sale of the cotton crops, the proceeds of which crops are accounted for by the administrator, but no annual return or settlement, as required by the statute above referred to, was made by the administrator. It further appears, that on the 7th December, 1842, the administrator made application to the court for final settlement upon the estate, and a day was appointed by the court for that purpose, and publication ordered, but nothing in furtherance of said order appears to have taken place. In April, 1846, another application was made by the administrator for final settlement, which was ordered, and which, after several continuances, was made in April, 1847. There is nothing appearing on the record of the proceedings had in the orphans' court, to show that the estate was administered upon under the act of 1835. We should

rather draw a different conclusion from the orders above referred to. The letters of administration are general—a general order was made at the time, for the sale of the personal estate, without exemption as to the slaves. The failure of the administrator to make, and of the court to require annual returns of the monies received, and the expenses incurred, and the disposition of all monies received from the estate, and accounts of funds paid or expended for the distributees,—all these are persuasive to show, that the estate was in process of settlement under the general law. There was then, nothing of record which would authorize the court, some six years after the order was passed granting administration to make the amendment in the order, changing the character of the administration. The argument of the defendant's counsel, that the leave granted annually to the administrator to sell the crops, and the receipt of his accounts of sales, establish that the orphans' court had granted the order to keep the estate together under the ten years' statute, is untenable, inasmuch as none of these orders were made at the term when it is insisted the authority sought to be supplied by the amendment, was conferred; and it cannot be that the court, where there is no record evidence to amend by, can make the evidence which is to be the predicate of its subsequent action in making the amendment. If such were permissible, the statute, (Dig. 322, § 55,) would be entirely evaded. This only authorizes amendments when the record furnishes sufficient matter to amend by. In *Thompson v. Miller*, 2 Stew. 470, it was shown by parol evidence, that at a previous term of the court, an order had been made requiring the plaintiff, who was a non-resident, to give security for cost, and the order not appearing on the minutes, it was entered *nunc pro tunc*, but this court say, "we have no hesitation in saying, the order of the court below, entered *nunc pro tunc*, on oral testimony, was erroneous—such orders or judgments are only authorized where predicated on matter of record, or some entry or memorandum made by, or under the authority of the court." This case is referred to without disapproval in the case of *Brown v. Bartlett*, 2 Ala. Rep. 29, and the same principle is reaffirmed in *Armstrong v. Robertson and Barnwell*, 2 Ala. Rep. 164, in which the name of

Franklin Robertson, instead of Franklin Armstrong, was inserted in the judgment entry by mistake. See also, *Andrews, adm'r, v. The Branch Bank of Mobile*, 10 Ala. Rep. 375. These authorities, sustained as they are, by numerous decisions of other states having similar statutes, (see *McKey v. Moore*, 4 Bibb, 321; *Varnon v. Moore*, 1 Monr. Rep. 214; *Waldo v. Spence*, 4 Conn. Rep. 71; *People v. McDonald*, 1 Cow. Rep. 189; *Atkins v. Sawyer*, 1 Pick. Rep. 351,) are quite sufficient to show there was no warrant for the entry made *nunc pro tunc* in the case at bar. The effect of the entry was to give the court a jurisdiction which it did not possess before the act of 1835, and to change materially the administration of the estate, and we feel satisfied the court erred in receiving and acting upon the parol evidence, in making the amendment, as shown by the bill of exceptions.

2. The law, as applicable to this administration, required the administrator to receive the assets of the estate, to pay the debts which were a charge upon the estate, and to pay the residue to the persons entitled to receive it. *Willis's adm'rs v. The Heirs of Willis*, 9 Ala. Rep. 330. If under a misapprehension as to the fact that the record showed he had authority to keep the estate together, he has gone on to incur expenses in keeping up the farm and supporting the hands, and rearing the infant children, and has expended his own labor in the management of the business, we will not say he is without remedy; all we now decide is, he cannot be relieved in the orphans' court, to the extent that court has gone in its decision. As he had no authority for keeping the estate together, and working the slaves on the plantation, the distributees may elect whether they will take the profits of the business, or will go against the administrator for the reasonable rents of the land, and use of the personal property. See *Steele v. Knox*, 10 Ala. Rep. 608. If they elect to take the hire for the slaves, the administrator will be allowed for his services in taking care and providing for such of them as could render no service; so also, if they take the profits, the nett proceeds of the farm and hands should be charged against him, and it is competent for the orphans' court, if the administrator has in good faith personally super-

intended the hands as an overseer, (and we think the evidence very satisfactorily shows the fact,) to allow him whatever sum a prudent man would have been justified in paying an overseer, taking into consideration the situation of the estate. See *Harris v. Martin*, 9 Ala. Rep. 895; *O'Neil v. Donnell*, Ib. 734.

It is unnecessary for us to notice the many items objected to in the account furnished by the administrator on final settlement. The views above expressed, will furnish a sufficient guide as to them upon another settlement.

The decree of the orphans' court is reversed, and the cause remanded.

HARRIS v. MAULDIN, ET ALS.

1. One or more of several wrong doers, against whom nothing is proved, may be acquitted, and examined as a witness for his co-defendants; but where the least evidence is given against one of several wrong doers, who is sued jointly, he cannot be discharged on the trial, for the purpose of being examined as a witness.

Error to the Circuit Court of Talladega. Judgment by his Honor George W. Stone.

CASE for a malicious prosecution, by the plaintiff in error, against the defendants in error. The questions presented, arise out of a bill of exceptions, and present the following facts: The defendant Mauldin, sued out, and obtained a warrant to arrest the plaintiff, for an assault with intent to murder him; and it was in proof that Mauldin procured one Miller, to go with him and one Coley, six miles to get the warrant. That they left after night, got to the magistrate's near 10 o'clock at night, and obtained the warrant, Miller

being deputed to act as constable. That Mauldin, and Miller, went to the house of defendant Simmons, and woke him up, and at Miller's request he went with them, two miles and a half, to point out the plaintiff to the constable, to whom the plaintiff was unknown. That Simmons went with them, to where the plaintiff had camped with his wagon, woke him up, and he was arrested by the constable. The defendants Burns, and Dobbins, lived more than twenty-five miles from Mauldin's, but were at Mauldin's house, where Mauldin, Miller, and Coley, set out to obtain the warrant, and were acquainted with the plaintiff.

It was in proof, that the difficulty between the plaintiff, and Mauldin, grew out of a claim which the former asserted to a slave, which the latter had hired to the defendant Burns, and which Burns delivered up to the plaintiff on his demand. Burns and Dobbins were with Mauldin, when the latter attempted to take the negro from the plaintiff, which he prevented, by raising an axe. Dobbins and Burns were both present at Mauldin's house the next morning after the arrest. Dobbins and Mauldin both told the plaintiff, that if the warrant was pushed it would send him to the penitentiary.

On the way to the justice of the peace, they stopped at Simmons's house, and Mauldin, alledging that he was sick, or drunk, went to bed. Burns and Dobbins informed the plaintiff, that Mauldin had authorized them to settle the prosecution, if he would give up the bill of sale to the slave in controversy, and make a deduction upon a note which he held against Mauldin. This was done, and the constable entered on the warrant, satisfied by consent of parties. The plaintiff was a resident of Georgia.

The defendants' counsel then insisted, that there was no evidence against Burns, Dobbins and Simmons, and that they desired to examine them as witnesses, and prayed the court to discharge them. The court refused to discharge them, but held, that there was no proof against Burns and and Simmons, and instructed the jury to find a verdict of not guilty as to them; to which the plaintiff excepted. Burns was then introduced as a witness for the defendants, and the plaintiff again excepted.

These matters are now assigned as error.

S. F. RICE and J. T. MORGAN, for plaintiff in error.

1. In Alabama, the presiding judge has no power to non-suit a plaintiff, either as to all the defendants, or as to a portion only of the defendants. And he cannot direct an acquittal by one of several tortfeasors, because that is equivalent to a non-suit as to such tortfeasor. 5 Ala. Rep. 341.

2. There was evidence showing that Burns, Dobbins and Simmons, were engaged in the malicious prosecution of the plaintiff, and were aiding and assisting Mauldin to deprive him of his liberty, in order to force him into a compromise of his rights; and however slight the evidence was, the court could not lawfully compel the jury to acquit them, even if our practice allowed a judge in any case to direct a non-suit. *Brown v. Howard*, 14 Johns. Rep. 119.

3. If the warrant was maliciously sued out by Mauldin, and the arrest was malicious, all the acts done by Simmons, Burns and Dobbins, with a view of assisting Mauldin in the prosecution of his designs, if done with malice, or without reasonable or probable cause, render them equally liable to the action, as if they had procured the issuance of the warrant. *Clifton v. Grayson*, 2 Stew. R. 412, and cases there cited.

4. Simmons got up out of his bed, and went two miles, and actually put Harris in custody, under the guise of presenting him to the constable as an acquaintance. Simmons and Dobbins told Harris that if the case was prosecuted it would send him to the penitentiary. Burns and Dobbins were both present when the difficulty occurred, in which Harris drew his axe; were present when Harris was arrested at Mauldin's house—and Burns and Dobbins settled the prosecution upon the unjust terms stated in Rucker's deposition. All their conduct evinces a preconcerted plan to put Harris in duress, under process sued out without cause, and to compel him to buy out the prosecution at a great sacrifice. These are the highest evidences of malice.

L. E. PARSONS, for defendants, referred the court to 3 Phil. Ev. 1552; 6 J. J. Marsh. 53; 6 Car. & Payne, 213.

COLLIER, C. J.—It is said to be an indisputable rule, that

one or more of several wrong doers, against whom nothing is proved, may be acquitted and examined as a witness for his co-defendants. *Rigdon's Heirs v. Rigdon's Devisees*, 6 J. J. Marsh. Rep. 53; *State v. Shaw*, 1 Root's Rep. 134; *Barney v. Cutter*, Id. 489; *Wakeley v. Hart*, 6 Binn. Rep. 316; *Brown v. Howard*, 14 Johns. Rep. 119; *Van Dusen v. Van Slyck*, 15 Id. 223; *State v. Blennerhassett*, Walker's Rep. (Miss.) 7; *Bates v. Conkling*, 10 Wend. Rep. 389; *Gilmore v. Bowden*, 3 Fairf. Rep. 412; *Sawyer v. Merrill*, 10 Pick. Rep. 18; *Wynne v. Anderson*, 3 Carr. & P. Rep. 596; *Child v. Chamberlain*, 6 Id. 213; *King v. Baker*, 2 Adolp. & E. Rep. 333; *Carpenter v. Jones*, 1 Mood. & M. Rep. 198; *Wright v. Paulin*, 1 Ryl. & M. R. 128; *Wilmarth v. Mountford, et al.* 4 Wash. C. C. Rep. 79; *Lanning's Lessee v. Case, et al.* Id. 169; *Schermerhorn v. Schermerhorn*, 1 Wend. R. 119. But where the least evidence is given against one of several wrong doers who is sued jointly, he cannot be discharged on the trial, for the purpose of being examined as a witness. The want of evidence against a party, it has been said must be so glaring and obvious, as to afford strong grounds of belief, that he was arbitrarily made a defendant to prevent his co-defendants from availing themselves of his testimony. In *Brown v. Brown*, *ut supra*, which was an action of trespass against the captain of a vessel and two others, for an assault and battery on the plaintiff, who was a seaman on board the vessel, it was proved that the two other defendants, who were the mates of the vessel, tied the plaintiff, whom the captain had beaten: *It was held*, that the evidence against the two defendants was such, that they were not entitled to an acquittal for the purpose of being examined as witnesses for the captain. The cases cited do not perhaps lay down a less restricted rule than this decision affirms.

The question to be determined is, does the evidence recited in the bill of exceptions, implicate Burns and Simmons in the supposed tort of Mauldin, so that the circuit judge could not with propriety have directed their acquittal for the purpose of making them witnesses for Mauldin. In order to solve this inquiry, it is necessary to examine the facts. First, then, in respect to Simmons, he was awakened at a late hour of the night by Mauldin and the constable. went with them

at their request two miles and a half to point out the plaintiff to the constable—he accordingly awakened Harris, while the latter was sleeping in his own wagon, invited him to the camp fire under the pretence of talking with him, and there introduced him to the constable, who took his hand and executed the warrant. In addition, it may be stated that Simmons was a man of family, and the slave whom the plaintiff had taken into his possession, was, at the time all this occurred, at his (Simmons's) house. Simmons was present at Mauldin's house when the plaintiff was carried there, the morning after his arrest. As the constable, with Mauldin and others, was going professedly to the justice of the peace who issued the warrant, they stopped at the house of Simmons, where Mauldin went to bed, saying, either that he was drinking or sick. There the prosecution was compromised, and the plaintiff suffered to go at large, though Simmons does not appear to have had any direct agency in the compromise.

Burns, it seems, was the hirer of the slave from Mauldin, and delivered him to the plaintiff previous to the institution of the proceedings against the latter, and was at Mauldin's house when Mauldin went for the warrant, and remained there until the next morning. He was in company with Mauldin when the latter had an angry controversy with the plaintiff in respect to the right to the slave on the evening before the arrest. Burns was also at Mauldin's house when the plaintiff was taken there in the custody of the constable; and was present at Simmons's, and an active agent of Mauldin in settling the prosecution against the plaintiff.

The mere recital of the facts is quite sufficient to show that Simmons and Burns were not so wholly disconnected with the matter complained of, as to authorize their discharge and examination as witnesses. Whether they were associated with Mauldin, encouraged, aided, or prompted him to prosecute the plaintiff—the motive of their presence upon the several occasions referred to, and the *quo animo* with which they acted were properly referable to the jury; and could not have been determined by the court. In directing, therefore, a verdict of acquittal as to these defendants, the cir-

cuit court erred. The judgment is reversed, and the cause remanded.

Judge CHILTON not sitting.

PHELAN v. PHELAN, ET AL.

1. Although an estate is declared insolvent, yet if on settlement it prove not to be so, creditors who have not filed their claims within the time prescribed by law, are entitled to payment of their debts, if presented to the administrators within eighteen months from the grant of letters of administration.

Error to the Orphans' Court of Wilcox.

THE plaintiff in error, administrator *de bonis non* of the estate of William Phelan, deceased, represented the estate to be insolvent, and it was accordingly so declared, no creditor appearing to show cause; and no nomination being made by the creditors, he was continued in the administration, an order made that all creditors should file their claims, and a day set for auditing them.

Upon the settlement, it appeared the assets in the hands of the administrator amounted to \$5,498 58, and the amount of claims filed within six months, \$3,086, which being allowed, left in the hands of the administrator, \$2,411.

The administrator then insisted on retaining in his hands, a sufficiency to pay certain judgments, which had been rendered against him; and proved that the claims on which they were founded, had been duly presented to him as administrator, and all of which, except one, he had paid since the estate had been declared insolvent. The court on the

objection of the distributees, refused to permit the administrator to retain these amounts, and rendered a decree against him, for the balance in his hands, in favor of the distributees.

To reverse this decree, this writ of error is sued out.

SELLERS, for plaintiff in error.

PORTER & BRODIE, contra.

These claims not having been filed within six months after the estate was declared insolvent, are barred. *Lattimore v. Williams*, 8 Ala. Rep. 428; *Hollinger, et al. v. Holly, et al.* *Ib.* 454.

If barred by the statute of non-claim, the administrator had no right to pay them. *Thrash v. Sumwalt*, 5 Ala. R. 20, and cases decided at this term.

The record shows that these very items were refused on being presented at the auditing, by the holders of these claims. They are consequently barred.

Creditors can have no advantage from the fact that the estate afterwards proves solvent, because the declaration of insolvency is as to him *res judicata*.

An administrator *de bonis non*, after an estate is declared insolvent, has nothing to do with any period of time prior to his appointment; he is different from other administrators; he is the mere agent of the creditors, and can only look back to the insolvency.

DARGAN, J.—The orphans' court misapprehended the law. If a claim is presented to the administrator within eighteen months from the time of the grant of letters, it is a good presentation, so far as the interest of the distributees is concerned; and a claim so presented binds their interest. If, however, the estate is declared insolvent, since the act of February, 1843, the claim must be filed in the clerk's office of the orphans' court, within six months from the time of the rendition of the decree of insolvency, otherwise such creditor cannot participate with the other creditors in the distribution of the estate. See 8 Ala. Rep. 454. The statute of

1843, is intended merely to affect the rights of creditors, as amongst themselves, in the distribution of an insolvent estate ; and if a creditor does not file his claim in six months from the time the estate is declared insolvent, those creditors who have so filed their claims, shall be preferred over those who have not.

But this is the only effect that can be given to a failure to file a claim in the clerk's office, within six months from the time the estate is declared insolvent. And if an estate be declared insolvent by mistake, as this appears to have been, and it afterwards appears that it is able to pay all the debts, the distributees can claim nothing from a failure to file the claims in the clerk's office within six months. Their rights are bound, if the claim is presented to the administrator within eighteen months. Hence it follows, that as the claims on which judgments had been rendered against the administrator, had been presented within the eighteen months, they should have been allowed as against the distributees. The final decree of settlement is therefore reversed and remanded.

McKINLEY v. IRVINE, ET AL.

1. A reference to the master, to ascertain the sum which by the decree is ordered to be paid to the complainant, does not render it interlocutory, when the principles are settled by the chancellor by which the amount is to be ascertained.
2. An allegation in a bill, by which the complainant deduced his title to three shares of stock, in an unincorporated company, averring that the shares were purchased by one H, principally with the means of one J M, to whom the certificates of the stock were delivered, and a power of attorney executed to one B, by H, to transfer the title to J M, but which was not done. That J M departed this life, and B and H executed a power of

attorney to J T M, to make such title to said shares of stock, as was in them. That the complainant became the purchaser of said shares of stock from J T M, and his brother, J H M, the heirs and distributees of the said J M, who for themselves, and the said J T M, as attorney for H and B, by deed conveyed to complainant, said three shares of stock, is not sustained by proof, that J T M, and J H M, were entitled to the stock as the *devisees* of their father, J M, and not as his *heirs*, the title being put in issue.

3. An agent appointed by the trustees of an unincorporated land company, to bring its affairs to a close—to receive all monies due from, and to adjust, settle, and compromise with the debtors of the company—and having authority to receive the stock of the company at \$475 a share, in the final settlement with the purchasers of lots, and lands of the company—cannot purchase in the stock of the company for his own use; but such purchase will be regarded as being made on behalf of his principals.
4. After such agency had ceased, he might become the owner of stock in the company, but could not thereby entitle himself to retain in his hands money which he had collected as agent, and attorney at law for his principals, unless insolvency, or some independent ground of equitable interposition exists. The non-residence of the trustees, is no ground for the interference of chancery, that fact being known to the agent, at, and previous to his purchase of the stock.
5. Though a trustee cannot make a profit by the purchase of the trust property, the objection can only be raised by the persons interested.
6. Expenses incurred by trustees in the erection of a tavern, and public county buildings, though made in good faith, and though they tended greatly to enhance the value of the town lots, cannot be allowed as a credit to the trustees in their account, unless such expenditures were authorized by the authority under which they acted, or the shareholders expressly, or impliedly, consented to the outlay.
7. When the subscribing witness to a deed, voluntarily incapacitates himself from proving it, by becoming interested in it, the deed cannot be proved by secondary evidence.
8. To authorize the proof of documents at the hearing, *viva voce*, reasonable notice must be given that such proof will be offered.
9. All the trustees of a private land company, who have participated in the execution of the trust, or their personal representatives if they be dead, should be parties to a bill filed by a stockholder, for the settlement of the trust estate.
10. It is too late to amend a bill, after proof taken on both sides, and the cause finally heard, when the amendment would put in issue a different title from the one previously asserted. The rule, it seems, is different in respect to parties, or mere clerical mistakes.

Error from the 28th Chancery District. Before the Hon. D. G. Ligon, Chancellor.

THE bill was filed by the plaintiff in error. The facts, as shown by the bill, answers, and proof, so far as they are material to the points decided by the court, may be thus briefly stated. In March, 1818, a company was formed, composed of many individuals, called the Cypress Land Company, who purchased lands at the public sales, for the purpose of laying out the town of Florence, establishing ferries, &c. On the 12th March, 1818, the company appointed seven persons trustees, for the management and disposal of the property, viz: Leroy Pope, Thos. Bibb, John Coffee, Jas. Jackson, John Childress, Dabney Morris, and John McKinley, who, by indenture accepted the trust, and covenanted to stand seized in trust for the common benefit of the members, in proportion to their interest, and to perform the articles of association; the 2d article of which divided the capital stock into 408 shares, to be divided among the members, in proportion to the purchase money paid by each. Certificates of stock to be issued by the trustees, registered and numbered, and were made assignable. By other articles the trustees were empowered to rent, or sell land, establish ferries, &c.; to lay out the town of Florence; to make donations of lots for public use, &c.; to appoint sub-agents; and to receive five per cent. commissions on receipts. Share holders to pay expense of laying out town, &c. Certificates to issue in the name of the trustees, to make payment out of joint funds. To keep journals of their proceedings open to inspection, &c. and once a year to be submitted to stockholders. The profits to be distributed annually, and as soon as possible after the term of credit on sales, final settlements to be made. Assignees of stock to have the same rights as original holders.

The trustees accepted the trust, and signed the certificates of stock, and made sundry sales, amounting to \$300,000. That Coffee, Jackson, and McKinley were the acting trustees, of whom McKinley is the survivor, and resides in Kentucky. That in 1834 the trustees adopted a resolution, that the shares should be taken in payment of debts, at \$475 a share, and that the debts upon an average, were due in July, 1824. That on the 10th September, 1834, a power of at-

torney was executed to complainant, authorizing him, under the control of McKinley, and Jackson, to settle the business, and collect debts, &c. That he acted under this power for several years, and made many settlements in stock, at the value of \$475 a share, and collected considerable sums of money, which he paid over to said trustees. That in October, 1841, he exhibited his account as agent, and applied for a settlement, demanding payment on three shares of stock, then in his hands for collection, belonging to John T. and James H. Montgomery. That McKinley refused to allow more than \$475 on each share, whilst complainant insisted the shares should be increased by the interest on the debts, accumulating since the resolution fixing the value of the stock, and then paid over all the money in his hands, except \$2,639, exclusive of some personal demands against McKinley; and that for this amount, suit has been instituted, and is now pending against him, in the circuit court of Lauderdale.

That since the institution of the suit he has purchased the three shares of the Montgomerys, taking their deed, as *heirs and distributees* of James H. Montgomery, and the deed of J. T. Montgomery, as agent of Hazard & Buncker, in whom the legal title was vested, which bears date 3d September, 1842. That the shares, with the accruing interest, are worth from \$1,000 to \$1,200 each. The complainant also claimed an interest in another share, assigned to him by T. & J. Kirkman, during his agency.

The complainant alledges, that the trustees have failed to comply with the stipulations of the trust, under which they acted, and makes McKinley and Pope, the surviving trustees, and the legal representatives of Jackson and Coffee, parties to the bill. The prayer of the bill is for an injunction and account, and for a set off in equity, for the amount due on the shares of stock—for a decree for the residue, if any, and for general relief.

McKinley answered the bill, and admitted the organization of the company, acceptance of the trust, &c., as stated in the bill. That for the purpose of advancing the interest of the stockholders, it was agreed to erect, at the expense of the company, a hotel, court house, &c., which was made

known to the bidders, and greatly enhanced the price of the lots, and that Hazard, the former owner of the stock, was present, heard the announcement, and made no objection, and insists that under the articles of association, the trustees should be allowed to do any thing which was for the benefit of the company. That the hotel built pursuant to this promise, cost \$30,000, and the public buildings, \$20,000.

That he applied to complainant as his agent, to ascertain the outstanding stock, and was told, there were three shares in the hands of one Montgomery, of Philadelphia; and upon inquiring of Montgomery, respondent was referred to complainant. That he refused to settle with complainant at a higher rate than \$475 a share, agreeably to the resolution of the trustees, and that after that allowance is made, he is still indebted to the company \$4,500. The answer contains much other matter, not necessary to be noticed. The other defendants also answered the bill in general, denying the allegations, and calling for proof.

Evidence was taken on both sides, which so far as it is important, will be found embodied in the opinion of the court.

The chancellor, at the hearing, decreed to the complainant the value of the stock held by him, and directed an account to be taken, in which the master was directed not to allow a credit for the cost of the erection of the hotel, and other public buildings. From this decree this writ is prosecuted.

HOPKINS, for plaintiff in error.

1. The defendant in error derives his title in his bill to the shares of stock, from two of the sons of James Montgomery, deceased, as the heirs at law and distributees of their father. It is alledged in the bill, that James Montgomery was at his death the sole owner of the whole beneficial interest in these three shares. The legal title to all the real estate of the Cypress Land Company was in the trustees, and the articles of association required them to sell and convey it all. The beneficiaries were entitled to receive from the trustees dividends upon the money only collected from the rents and sales of the real estate. The interest, therefore, of James Montgomery, deceased, in the shares, was personal property, and

belonged to his personal representative appointed by the State, in which the surviving trustees who were the debtors, resided. The bill therefore shows no title to these three shares, and is therefore bad upon demurrer, and without a demurrer, should be dismissed for want of equity. Story's Eq. Pl. § 254, 319, 320, 504, 505, 508, 509, 510, 728, 447.

2. The evidence proves that James Montgomery died in Philadelphia, where his domicil was at his death. His interest in the stock was personal property, which formed no part of the assets that belonged to his personal representative, appointed by Pennsylvania. It was under the protection of the laws of the States in which the debtors reside, and the Pennsylvania executor or administrator was incapable of transferring to a purchaser any interest in the shares. 4 How. Rep. (U. S.) 467; 8 Porter, 401, 402; Story's Conf. Laws, 421, 422. The proper personal representative should be a party. Story's Eq. Pl. § 209, 541.

3. The complainant in his bill derives his title from the heirs and distributees of James Montgomery. The evidence proves (deposition of Montgomery) that he acquired such title as he has from the devisees of James Montgomery. For this variance between the title stated in the bill and the title proved, there ought to be a decree for the plaintiffs in error. The title stated must be proved: no proof can have any effect which does not support some allegation in the bill. Sto. Eq. Pl. § 263, 264, 254; 10 Wheaton, 189; 10 Peters, 178; 1 Ala. R. 330; 3 Id. 421; 3 Porter, 473; 2 Ala. Rep. 153; Story's Eq. Pl. 257, 258, 264. The last three sections, to show the fact that he derived title from the devisees, is not in issue, and cannot be proved, and the proof, if offered, can have no effect, and there is no proof of the title he states in the bill.

4. It appears from the bill, that the complainant was the agent of the trustees, for one purpose, among others, of paying to such stockholders as would receive it, \$475, in full discharge of each share that might be delivered to him for this sum. He was employed by the trustees, and was their agent. He was accountable to them, and not to the stockholders or beneficiaries. He is bound to pay to the trustees, and not to any beneficiary, the money he has collected as

their agent. Story on Agency, 208, § 217. As the agent of the trustees, he acted illegally in asserting the interest of the estate of James Montgomery, deceased, against his principals. Story on Agency, § 217.

5. It appears from the bill, that the complainant retained a large sum of the money he had collected as agent, because the trustees would not pay the sum he claimed to be due upon these three shares. The sum which he withheld from his principals, he had in his possession when he purchased the three shares. It is not stated in the bill what price he paid, or agreed to pay, for these shares. In the absence from the bill of any statement of the price, the bill must be treated as one in which it appeared that the money he withheld from his principals was equal in amount to the price. His bill shows he had a certain amount of money in his hands that belonged to his principals, and contains nothing to show it was less than the price. As he was the agent of the trustees when he undertook the performance of duties to the Montgomerys inconsistent with those of his agency, and had the money of his principals in his hands when he bought the shares, the purchase must be treated as if he had made it while he was acting as the agent of the trustees. By retaining their money, he continued under an agent's disability to purchase for himself with the money of his principals. If his principals would allow him, upon his request, the price he paid for the shares, he could have no farther demand upon the transaction against them. He does not alledge in the bill that he had informed the trustees of the price, and asked to that amount a credit with them against the sum he lawfully withheld. He had a legal defence to the extent of \$475, for each of the shares against the action at law. His principals have never refused to allow this sum for each of these shares. The bill contains no equity, and ought to have been dismissed. Story's Eq. Pl. § 447; 4 How. Rep. (U. S.) 467; 6 Cranch's Rep. 149; Peters's C. C. Rep. 364; Prevost v. Graby, 2 Wash. C. C. Rep. 441.

6. The deposition of Montgomery proves the complainant received the shares for collection, while he was acting as the agent of the trustees, and resigned his agency, as he stated in his letter to Montgomery, because McKinley, the surviv-

ing trustee, refused to pay more than \$475 per share, and that he might prosecute the claim he made for a larger sum upon the shares. The same deposition proves that the complainant informed Montgomery he withheld the money from his principals, and that while he was acting as the agent of the trustees, he endeavored to purchase the shares for himself, and finally bought them, that he might make of the purchase the foundation of a bill in equity to protect himself from the payment of the money he had retained in violation of his duty as an agent. He paid for the three shares, as the same deposition proves, \$1,533 33, in land assessed at this sum, of less value doubtless than the sum the surviving trustee offered to pay in discharge of the certificates of stock. The complainant is bound by the agreement with the vendors of the shares, to pay them \$500 in money, in the event he should succeed in preventing a judgment against him for the money which he holds of his principals! That money he received as an agent and employed to speculate upon for his own benefit. Upon the evidence, the case is more unfavorable to the complainant than on his bill, which is itself destitute of all equity. He acted illegally in taking the shares for collection, while he was the agent of the debtors. He acted illegally in refusing to pay his principals the money he had received as their agent, and in withholding it to coerce such a settlement of the value of the shares as he required, and equity ought not to afford any relief upon his claim, which is connected with, and founded upon so many unlawful and unjust acts. 6 Ala. Rep. 20, 22; 2 Vesey, jr. 319, 320. The deposition of Weakly proves that the trust funds are insufficient to pay \$475 on each of the outstanding shares, and there is no evidence that outweighs his.

7. The decree directs the value of the shares to be paid to the complainant, and the value of them to be ascertained according to rules prescribed by the decree. It is an unconditional decree, for the value of the shares in favor of the complainant. The decree directs the money withheld by the complainant, as well as the expenses which had been paid in the execution of the trust, to be deducted from the gross amount of the receipts by the trustees, and that the master shall allot to the complainant upon each of the shares, one-

408th part of the remainder. The decree disposes of the money withheld, because it is made a part of the basis of the decree in favor of the complainant for the value of the shares, and the basis could not afterwards be altered by the chancellor without altering the decree itself. In effect, the decree leaves the money retained by the agent, where it leaves the amount of the expenses, in the hands that held it when the decree was made, and disposes of one amount as finally as it does the other.

8. If the decree did not make a final disposition of the money in the hands of the agent, it would still be final, because it settled the rights of the parties. The complainant has no right to the money he withholds, as he has a decree against all the defendants for the value of the shares; all of whom reside in Alabama except McKinley, and it is not alledged in the bill that he, or either of the other defendants, is insolvent. It is not alledged that McKinley had no property in Alabama. 2 Ala. Rep. 170.

9. The part of the share sold by the Kirkmans to the complainant, was purchased by him in 1836, when he was the acting agent of the trustees, with funds in his hands belonging to them to a much larger amount than the purchase money he paid for his interest in the share. It belongs, therefore, to the trustees, and as he does not state the trustees refused to allow him the sum he paid for it, the relief asked in relation to this share is opposed by the objections made upon the merits, to any decree in his favor for the other shares. The bill does not state the price he paid for it.

10. The power of attorney from Hazard to Buncker authorized him to transfer to James Montgomery such shares as belonged to Hazard & Buncker jointly. One of the three shares belonged to Hazard & Co. and the other two to Hazard only. Buncker had no authority to transfer the latter, and it is not proved that Buncker had an interest in the other.

11. The decree denies the right of the trustees to charge the trust fund with the cost of the public buildings of the county of Lauderdale, which the trustees caused to be erected, to increase the value of the town lots. It makes no allowance to them for the cost of the hotel, which the trustees

erected to improve the value of the trust fund, although the proceeds of the sale of the hotel are charged to the trustees, as a part of their receipts for the company. If the complainant were entitled to the value of the shares, the cost of all these buildings should be deducted from the receipts, to ascertain the sum out of which the shares would be entitled to dividends. 1 Sch. & Lef. Rep. 363, 369, 384; 2 Id. 567, 580; 4 Howard (U. S.) 565; 2 Ala. Rep. 573. It was unnecessary for the chancellor to conclude his decree with an order that the cause should be retained till the report of the master should come in. By the operation of law, it would be retained longer than the order directed.

12. The proof made by Willis Pope of the execution by Hazard & Buncker of the power of attorney alledged in the bill, which evidence is stated in a bill of exceptions signed by the chancellor was incompetent. No deed or other writing can be proved on the hearing, except on an order previously obtained from the chancellor after due notice to the adverse party. 1 Hoffman's Ch. Prac. 490, and note 3; 1 Johns. Ch. Pr. 559; 2 Johns. Ch. R. 481; 4 Hen. & Munf. 441; 2 Id. 124. As the complainant was a subscribing witness, and had disabled himself from giving evidence, by acquiring an interest, other evidence was incompet to prove the hand-writing. 3 Stew. & Porter, 227.

13. As the power was not proved, the legal title to the three shares is in Hazard & Co. and S. Hazard, and if there were a bill with equity in it, they would be indispensable parties, as would be also all the living trustees, and the personal representatives of such as were dead when the bill was filed. Story's Eq. Pl. § 209, 541.

E. W. PECK and L. P. WALKER, contra, submitted the following points for the defendant in error :

1. As to the title of the defendant in error to the shares of the stock of said company, claimed by him, and, first, as to the share No. 390. This share was purchased by defendant in error of T. & J. Kirkman.

The plaintiffs in error substantially admit the defendant's title to this share, but insist as to this share, he must be considered as a trustee for the company, and alledge, that at the

time of the purchase, he was the agent and attorney for the company, and had funds of the company in his hands, and that it was his duty to have bought it for the company, &c. Now, in the first place, this is defensive matter, and should have been proved. In the next place, it is only necessary to look at the defendant's power of attorney, to see that he had no authority to buy stock for the company—and if he had no authority to buy for the company, then it was clearly lawful to buy on his own account. It seems that this is all that is necessary to say as to this share.

2. As to the shares No. 187, 397, and 399. These shares were conveyed to the defendant by deed, from the Montgomery's, who had the equitable title, and by deed from Buncker and Hazard, who had the legal title. It was objected that these deeds were not legally proved. There is in the answers a strong implied admission that these shares belong to the defendant, by alledging that he is only entitled to be allowed \$475 per share, for reasons stated in the answers. Now, as to the proof of these deeds, we insist the proof offered by the defendant was sufficient, but if that was defective, the plaintiffs in error took the deposition of John T. Montgomery, who proved the power of attorney, given by Buncker and Hazard, by authority of which, their deed was made, he also proved the purchase of the shares by the defendant, for the sum of \$2,000, and also the execution of the deed from the Montgomery's to him. This proof being made by the plaintiff's own witness, they can with no propriety be heard to deny the fact of purchase. But these shares might as well have been purchased by parol as by deed, and the evidence was unquestionably sufficient for this purpose.

The objections made to the proof of these deeds were two: 1. That they could only be proved by the subscribing witnesses. 2. That they could not be proved *viva voce* on the hearing. As an answer to the first objection, the court is referred to the case of Barringer and Rhodes v. Snead, 3 Stewart's R. 201, and 9 Por. R. 605, and as to the second objection, to the case of Levert v. Redmond, 9 Porter, 79.

The objection made to the purchase, on account of the relation which the defendant bore to the plaintiffs in error, is

considered and answered when speaking of the same matter in relation to the share No. 390.

If, then, it was lawful for the defendant to purchase these shares, he, by the purchase was invested with all the rights and privileges of those from whom they were purchased.

If the vendors might, by bill in equity, have called upon the plaintiffs to make a settlement of the affairs of the company, and to state an account, with the shareholders, for the dividends, &c., so could the defendant, and it seems to us to require no argument to prove, that the trustees of a joint stock company, can be called to account in equity, at the suit of the shareholders—indeed, they can have a remedy in no other court. If these views be correct, then there is equity in the bill, whether the defendant is entitled to the set off prayed, or not. But the case made by the bill showed he was entitled to the set off. McKinley, the only surviving trustee had moved out of the state, and was a permanent citizen of Kentucky—he was, in violation of the fundamental laws of the company, disposing of the property, refusing to account, and withdrawing all the means of the company out of the state—this, it seems to us, gave the defendant the right to retain the funds of the trustees in his hands, for his security, until the plaintiff in error could be called to an account. The argument that he received the money as the agent of the trustees, is without force. Can it be said with any propriety, that he was bound to pay over the money in his hands, and then pursue his remedy in a foreign jurisdiction? We contend that no principle of professional obligation, or of morals either, required this at his hands. The trustees had utterly neglected, and disregarded their duties touching the management of the trust property—they had been for years dealing with the trust property for their own benefit, and speculating in the stock of the company. Now, we ask, if trustees, in such a case, may not be called to an account, by the *cestuis que trust*, in a court of equity, and if the trust property has been wasted by their negligence, or improper conduct, be held responsible for the loss; or, if they have made profits out of the trust property, be held accountable for such profits? In support of these propositions they cited Fonb. Eq. 475, 477: 80 1. J. C. R. 37: 4 Id.

586, 305; 11 Vesey, 92; 13 Id. 407, 590; 18 Id. 246; 4 Wend. 209; 2 McCord, 185; 2 R. C. 230.

3. The decree of the chancellor is interlocutory merely. This is evident from the character of the decree itself, and the direction of the chancellor, "that said cause be retained under this order and decree, until the report of the master come in as directed," and is wholly unlike the cases of *Weatherford v. James*, 2 Ala. Rep. 170, and *Bank of Mobile v. Hall*, 6 Id. 143. The writ therefore was prematurely sued out.

CHILTON, J.—1. We think the writ of error should not be dismissed. The decree directs the value of the shares to be paid to the complainant, which value is to be ascertained by rules which it prescribes. The amount in the complainant's hands, as well as the expenses, are required to be deducted from the gross sum of the proceeds, and complainant is declared to be entitled on each share to one four-hundred and eighth part of the residue. Thus settling the rights of the parties, we think it comes within the principle settled in the case of *Weatherford v. James*, 2 Ala. Rep. 170, and *Kennedy's Heirs, &c. v. Kennedy's Heirs*, Ib. 573, and must consequently overrule the motion to dismiss the writ of error. That a reference was awarded to the master to ascertain the sum, which by the decree is ordered to be paid complainant, does not change or affect the character of the decree, or render it interlocutory merely. See *Bank of Mobile v. Hall*, 6 Ala. Rep. 141.

2. The main question, and that to which we shall chiefly direct inquiry, respects the title made by the bill to the shares in controversy. The complainant must show by his allegations in the bill, that he is entitled to the relief which he seeks, and if he fail to set forth every essential fact necessary to make out his title to maintain the bill, the defect will be fatal. The general rule is, that no relief can be granted upon matters not charged, although the same appear in evidence, for the decree must be predicated upon the allegations as well as proof. "The reason for the rule," says Judge Story, "is, that the defendant may be apprised by the bill, what the suggestions and allegations are against which

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he is to prepare his defence." Story's Eq. Pl. § 257. Indeed, nothing is in issue except such facts as are charged in the bill, and all proof of facts not stated, either generally or circumstantially, must be regarded as without the issue, and consequently irrelevant, and a decree on such facts cannot be supported. Wilkes v. Rogers, 6 Johns. Rep. 565; Irnham v. Child, 1 Bro. Ch. C. 94; Crocket v. Lee, 7 Wheat. Rep. 522; Jackson v. Ashton, 11 Peter's Rep. 229; Gresley Eq. Ev. 22-3; Story's Eq. Pl. § 28; Morgan v. Crabb, 3 Porter's Rep. 470; Boazman v. Draughan, 3 Stew. Rep. 243; Murray's adm'r v. Mason's adm'r, 8 Por. 211; Clemens v. Kellogg, 1 Ala. Rep. 330; Gibson v. Carson, 3 Ala. Rep. 421.

In Gilchrist v. Gilmer, 9 Ala. Rep. 985, it is said, the general rule, that the proof must correspond with the allegations, applies only when the evidence discloses a cause for relief, different from that set up by the party pleading it.

The allegations of the bill in regard to the title of the complainant in this case are as follows: After stating the attempted settlement between complainant and defendant, McKinley, in October, 1841, when the complainant exhibited a statement of the amount of money in his hands, collected as agent for the trustees, and demanded the payment of three shares, numbered 187, 397, and 399, which he says were placed in his hands by John T. Montgomery, for himself and his brother, James H. Montgomery, under express authority to obtain payment of what was justly due thereon, and after averring McKinley's refusal to allow more upon each share than \$475, and complainant's withholding the sum of \$2639 61, to pay said shares, and the subsequent suit against him by the trustees for the same, the bill states, "Your orator further states, that since said suit has been instituted, he has become the purchaser of said three shares of stock from John T. Montgomery, and his brother, James H. Montgomery." The bill then states, that the shares were purchased by Samuel Hazard and Samuel Hazard & Co., but principally with the means of James Montgomery, deceased, the father of complainant's vendors. That under some arrangement, the certificates were delivered to him, the said James, and a power of attorney was executed by Hazard to one Bunker to transfer the certificates to said James

Montgomery, now deceased, but the transfer was not executed. That since the death of James Montgomery, Hazard and Buncker have made a power of attorney to John T. Montgomery, authorizing him to make such title to said shares as was in them. The bill then proceeds, "Your orator became the purchaser of said shares from said John T. Montgomery, and his brother, James H. Montgomery, *the heirs and distributees of said James Montgomery*, who, for themselves, and the said John T. Montgomery, as attorney in fact for Samuel Hazard and Charles N. Buncker, and in their names, by indenture, bearing date the 3d day of September, 1842, conveyed to your orator said three shares of stock, with all the rights and benefits appertaining thereto." Thus it is shown by the bill, that the equitable interest in those three shares was in James Montgomery, deceased, and this equitable interest the complainant acquired from his two sons, the heirs and distributees of said James, while he acquired the legal interest from Hazard and Buncker, by their deed, executed by John T. Montgomery, their agent. This is *the case* made by the bill, and upon which the complainant must recover, if he recovers at all. Nor is this averment of the manner in which he acquired the title unimportant, but it is essential to the validity of the bill. In *Wilburn v. Ingleby*, 1 Mylne & K. 61, a bill brought by a derivative shareholder in an unincorporated company, for an account against the directors, alledging that they had made a profit to themselves at the expense of the company, was held demurrable, because it only stated the plaintiff to be a shareholder by purchase; but it did not specifically state the mode in which he acquired his share, and the manner of his holding, and that he had performed the conditions which, by the rules of the company, were required to be performed, in order to validate the transfer. See also *Story's Eq. Pl.* 215.

It is unnecessary for us to examine the question made by the counsel for the plaintiff in error, as to the power of a foreign administrator to transfer the stock so as to vest in complainant a right to sue. The proof in this case shows that the two sons of James Montgomery, deceased, did not acquire the stock as his heirs and distributees, but by devise from

their said father; the will bearing date the 15th day of March, 1834, and duly proved and recorded in the register of wills for the city and county of Philadelphia. The question presented upon the record is, whether the proof sustains the case made by the bill. We think it clear that it does not. A title acquired by will as devisees was not put in issue by any of the pleadings, and forming no part of the complainant's case, could not properly be made the foundation of a decree in his favor. See cases above cited, and Story's Eq. Plead. § 257, 258, 264. In *James v. McKernon*, 6 Johns. R. 564, it is said, the good sense of pleading, and the language of the books, both require that every material allegation should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony in order to meet it. *Smith v. Smith*, 4 Johns. C. Rep. 281. So also, in *Buck v. McCaughtry*, 6 Monroe's Rep. 82, it was held that an allegation of suggestion of falsehood will not let in proofs of the suppression of truths. So, if the complainant seeks to rescind a contract on account of deficiency of land sold, he will not be allowed to rescind for fraud which he does not aver in his bill. *Gouverneur v. Elmendorph*, 5 Johns. Ch. R. 82; *Thompson v. Jackson*, 3 Randolph's Rep. 504; *Ibid.* 263; *Parker v. Carter*, 4 Munf. 273; *Boone v. Childs*, 10 Peters's Rep. 177.

The complainant having shown the equitable title to have been in the deceased Montgomery to the three shares, it is perfectly clear that he could not recover without showing the title became vested in himself. How does he show this? By a particular description of the conveyance under which he claims, a deed from two *heirs* and *distributees* of the decedent, one of them acting also as the attorney in fact of Bunker & Hazard, the holders of the legal title. Now, granting that the rule laid down in *Wilburn v. Ingleby*, is too stringent, and that it would be sufficient if the complainant had averred generally that he was the assignee of the three certificates of stock, which assignment to him vested in him a *bona fide* title thereto, and that under such general averment, he might well have adduced proof showing his assignor derived title in any way in which it could be acquired, still the party can derive no benefit from the argument. The

averment is, that "the complainant *became the purchaser* in a particular way which is specifically alledged, and the court is called upon to deduce the conclusion of title from the specific facts set out as constituting it. These facts are put in issue by the pleadings, and must be proved as charged. If we are to regard, as shedding any light upon this subject, legal analogies, (and Lord Hardwicke and Redesdale go so far as to hold that there should be the same certainty in a bill in equity that there is in a declaration—*Story v. Ld. Windsor*, 2 Atk. 632; *Mit. Pl.* 284,) it is well settled in the practice in the law courts, that if a party take upon himself to state a particular estate, where it was only required of him that he show a general, or even a less estate, title or interest, the adversary may traverse the allegation, and if it be untrue, the party will fail. 1 Chit. Pl. 228-9, marg. p. and authorities there cited; see also *Pharr & Beck v. Batchelor*, 3 Ala. Rep. 237.

So it is held that in an action on the case against the sheriff for levying under an execution against the tenant, without paying the landlord a year's rent, if the plaintiff, though unnecessarily, profess to set out the terms of the tenancy as to the time of payment of rent, &c. and misdescribe them, the variance will be fatal. 1 Chit. Pl. 229. Another illustration of the rule is given by the same author. Thus, a general freehold title, *liberum tenementum*, may be pleaded either in trespass or in an avowry in replevin, and under it the defendant may prove any estate of freehold, either in fee, in tail, or for life; but if he state, though unnecessarily, a seizure in fee of a particular estate or interest, and the other side traverse the allegation, it must be proved as stated. "There are instances," says Mr. Chitty, "of material matter being alledged with an unnecessary detail of circumstances or particularity. The *subject matter* of the averment is material and relevant, and the evil is, that the essential and immaterial parts are so interwoven, as to expose the whole allegation to a traverse, and the consequent necessity of proof to the whole extent to which it is carried in the pleading.

These citations may suffice to show what the rule is at law. It is insisted, however, by the counsel for the defend-

ant in error, that the averments as to the purchase from the heirs and distributees of the deceased Montgomery, may be rejected as surplusage, and that the defendant in error has a right in equity to have the account which he seeks, by virtue of the conveyance of the *legal title* from Buncker & Hazard to him of the three shares of stock. But we apprehend, that, assuming the allegations in the bill to be correct, Buncker & Hazard had no power to transfer an equitable right of action; for the bill states, the shares were purchased mainly with the money of James Montgomery, deceased, and were actually transferred to him by delivery, and a power of attorney was made by the holder of the legal title to execute to him a conveyance thereof. The bill thus showing the equity, coupled with the certificates of the shares, to be in the deceased Montgomery, it may be well questioned whether *any* title would pass by the conveyance of Buncker & Hazard, while the certificates remained in the possession of James Montgomery, deceased, or of his representative. Be this as it may, it is perfectly certain the court of equity would never proceed to decree relief without having the owners of the equitable interest, and who, in that court, are considered the real owners of the stock, before it. Were the practice otherwise, justice would be administered by halves—the rights of parties decided upon who have had no means of asserting them, and the defendant, who is compelled to obey the decree, is left to protect himself as well as he may, by future litigation. Story's Eq. Pl. § 72. But, as before stated, the averments here as to the purchase, and the manner of showing a derivative title, are material allegations, and without which the bill would be evidently bad. Mr. Daniell, in his able work upon chancery practice, thus states the rule as applicable to such averments: "In pleadings at common law, it is held that in stating a derivative title, a party claiming by inheritance must show *how* he is heir, viz., as son or otherwise, and if he claims by *mediate*, and not by *immediate* descent, he must show the pedigree. Stephens on Pl. 340. *It appears to be right, upon every principle, that the same rule should be observed in bills in equity.*" 1 Dan. Ch. Pr. 369. The same author, p. 363, lays it down that a plaintiff must not only show in his bill an interest in the subject mat-

ter of the suit, but he must also make it appear that he has a proper title to institute a suit concerning it, (Ld. Redesdale, 155;) for it very often happens, that a person may have an interest in the subject matter, and yet for want of compliance with some requisite forms, he may not be entitled to institute a suit relating to it. For example; an executor has a right to personal property of his testator, but he must prove the will before he can assert it. If he does not aver in his bill that the will had been proved, it is demurrable. Story's Eq. Pl. § 625; Cooper's Eq. Pl. 212; Humphreys v. Ingledon, 1 Pr. Wms. 753; Daniell's Ch. Pr. 364. In the case before us, the plaintiff claims as a purchaser from the *heirs* and *distributees*. If we allow the averment to be sufficient, without showing how the two Montgomerys, as heirs and distributees, acquired the right to dispose of the stock, the defendant would have a clear right to defeat the bill by showing plaintiff did not acquire title in that way; that the said Montgomerys were not heirs or distributees; that no distribution had been made; or, that the complainant below was *executor de son tort*. How, then, can such averments be regarded as surplusage or immaterial, when the whole case may be made to depend upon them? Suppose the defendant, having put in issue their heirship, had proved they were in no ways related to the decedent, could it be tolerated at the trial, to allow the complainant to offer proof that they were *legatees*? Why, the defendant might say, I have never before heard of such title. It was not in issue. I came prepared to defeat the title in issue by proving complainant had none, because none *descended* to his vendors as he averred. A will is wholly without the case, and proof concerning it irrelevant and improper. But if the will had been set up, I could have defeated the alledged title, averred to be derived under that, in various ways: either by showing that it was surreptitiously obtained; was never recorded; was revoked, or, was not the will of the supposed testator. Now, it seems to result, if a court of equity were to allow such title to prevail, the party might be taken upon surprise—the case goes off upon a title never once indicated by the pleading, and which the defendant, by the well established rules of equity practice, could not have been allowed to controvert by proof.

And if on the final trial, the cause is continued for amendment and proof upon the *will*, as is insisted should be done, even after the hearing upon error in this court, being defeated upon that title, he might in the same way set up a title by deed from the ancestor, and thus a complainant may, under this practice, take as many chances for success, as he may suppose he has grounds for setting up distinct titles. A chancery suit would rarely fail, under such a system, to cumber the docket for many years. We instance such examples as illustrating the principle, and not as otherwise applying to this case.

The authorities fully sustain the position, that where the complainant relies solely upon his title for the account which he seeks, he must show his title in the bill; and if he claim as a derivative purchaser, he must deduce his title regularly, and aver it correctly. An example is found in the case of Penny v. Hoper, Bunbury's Ex. Rep. 115; Ib. 129, where the lessee of a lay impropriator filed his bill against an occupier for an account of tithes, held, that as the right of the plaintiff depended solely upon his title, he must not only deduce it regularly, and the existence of the lease, but that the person from whom it is derived had the fee. Lord Digby v. Meech, Bunb. 195; Danl. Ch. Pr. 370-1; Story's Eq. Pl. 257, *et seq.* It also results, that being compelled to aver his title, he is required to prove it if put in issue, and proof of a different title than that averred will not sustain the bill.

We have devoted thus much space to this point, not because of any great difficulty involved in it, as we conceive, but because it is conclusive of the case in this court, against the defendant in error, and the contrary proposition has been urged with much zeal and ability upon our attention.

3. We proceed to state our conclusions upon the other points in the cause.

It is objected, that the proof shows the complainant, at the time he received these three shares from Montgomery, as also the share from the Kirkmans, was the agent of the trustees of the Cypress Land Company, to adjust its business and buy in the shares in the payment of debts due the com-

pany, at the rate of \$475 per share, as well as attorney for the said trustees, in possession of the books and papers, and retained to attend to the suits, &c., which should it be necessary to institute in the prosecution of the business; and it is insisted that he could not acquire an interest adverse to his principals, and that the purchase of the stock by him must be regarded as made for his employers, if he has shown a title to it, and to be paid for by them at the rate of \$475 per share. It is well settled that an agent employed by a trustee is accountable only to him and not to the *cestui que trust*; and a sub-agent is ordinarily accountable to the superior agent who employs him and not generally to the principal. See Story on Ag. § 217, a, and authorities there cited. In this case there was no privity between the agent, Irvine, and the stockholders. He derived his authority directly from the surviving trustees, who were charged with the distribution of the proceeds of the trust according to the articles of association into which they had entered, and it was the duty of the complainant to have accounted with the trustees, and not with those who may have been the holders of certificates of stock. This duty the complainant recognized by tendering his account, but claimed the right to retain of monies collected by him, what he regarded the value of the shares placed in his hands by Montgomery, as the agent of Montgomery to collect what was justly due thereon, pending his agency for the defendants. We think the complainant could not, pending his agency for respondents, contract with the Messrs. Montgomery, any relation which would justify the withholding from his principals the funds he had received by virtue of his agency. "The duty of thus guarding the interest of the principal, is not confined," says Judge Story, "to cases where the agent may sacrifice his interest by attempts to further his own; but the same particular policy extends to cases where the interests of strangers are sought to be asserted by the agent, adversely to those of the principal." The agent cannot assert the right of third persons to defeat the demands of his principal, nor dispute his title. Com. on Ag. 255, § 217, and cases cited.

The same principle obtains both at law and in equity, so where an agent had collected money for his principal, he

cannot be converted into a trustee for a third person by notice of his claim, but is bound to pay it over. *Ib.* 256; *Nicholson v. Knowles*, 5 Madd. Rep. 46; 2 Story's Eq. § 317.

It is however replied by the counsel for the defendant in error, that there was nothing in the power of attorney given by McKinley, Jackson, Bibb and Pope, to Irvine, which directly, or by implication, denied to him the right to receive the shares as agent, or to purchase them upon his own account. The power under which complainant below acted, after reciting the authority of the trustees to appoint agents, &c., proceeds, "The trustees being desirous to bring to a close the affairs of said trust, to that end, and for that purpose, have appointed, and by these presents do appoint, Jas. Irvine, for them, &c., to receive of and from the debtors of said company all sums that may be due and owing from the debtors of said company, and in default to bring suit therefor. We further authorize him to adjust, settle and compromise with all debtors to said company, under such regulations and orders in writing as John McKinley and James Jackson, the present acting trustees, may from time to time give, and upon payment made agreeable to such order, or otherwise, to execute and deliver in our names deeds with warranty, for all lands and town lots so paid for. We hereby ratify and confirm what he may do within the scope of his power, dated 10th Sept. 1834." Signed, sealed, &c. It appears, that previous to the execution of this power of attorney, the complainant below, in connection with his then partner, had been the agents and attorneys of the trustees, and that one of the books delivered to them contained a resolution, dated 28th October, '33, entered into by the trustees, authorizing "the stock of the Cypress Land Co. to be received at \$475 per share, in the final settlement with purchasers of lots and lands belonging to the company." It further recites, that although the acting trustees may lose by this arrangement, they have determined to submit to it for the purpose of closing the business as speedily as possible. Which is signed by McKinley and Jackson, and the acting executors of John Coffee. Under the foregoing authority the complainant avers that he acted for several years, and

“made many settlements based upon the value set upon the stock by said resolution.”

Now, it is true, the agent has no direct authority conferred upon him to buy in the shares for the trustees, but merely to receive them in liquidation of demands due the company at the price of \$475, but does it follow that he may deal in such shares himself, pending the agency, or become agent for others, to enforce collection from his principals? We think not. Suppose, as an illustration of the rule, that the agent employed to settle the business, by receiving and procuring the cancellation of shares at \$475, had himself, under a belief that the shares were worth more, purchased in the whole of them on his own account. It is most obvious the design of his agency, and the object of his principal would have been defeated. The same principle holds good, if, instead of permitting them to circulate, and to get into the hands of the debtors to the company, he had received them as agent for the holder, to collect what he deemed due upon them. In either case, the principal object of the agency, the speedy settlement of the affairs of the company, which had been thrown into confusion by the destruction of the books, &c. by fire, would have been thwarted, and what is true of all, is equally applicable with respect to any less number of the shares; for as to them, the agency cannot be carried out. “By the employment, the principal contracts for the disinterested skill, diligence and zeal of the agent for his exclusive benefit.” Story on Ag. § 210. He cannot act for his own benefit on the subject of the trust, so long as the fiduciary, or confidential relation exists, *Greene v. Winter*, 1 Johns. Ch. Rep. 26; *Parkhurst v. Alexander*, *Ib.* 394; *Bank v. Collins*, 7 Ala. Rep. 95. We feel constrained, according to our view of the law, to declare, that under the proof in the case, the purchase made on the 19th July, 1836, of T. & J. Kirkman, of an interest in the share numbered 390, by the complainant, must be regarded as made on behalf of his principals; and to hold that the funds due the trustees, could not be properly withheld for the payment of the three shares to Montgomery. The case does not rest upon the doctrine of resulting trusts from the use of the funds,

in the purchase of the stock, but upon the well established law respecting the powers and duties of agents.

4. But it is contended again, that the three shares were acquired after the termination of the agency, and that they are not affected thereby. We do not see how the bare fact of Irvine's being the debtor to the trustee for monies collected as agent, can, after the termination of the agency, and when he is sued for the funds, constitute any impediment to the purchase by him of shares in the stock; the disabilities of an agent grow out of the relation, and cease with it, but while he may purchase, a court of equity would not aid him in availing himself of such purchase to prevent a recovery at law by his principal, of monies collected by him as agent, and which he illegally withheld. In the absence of all intervening grounds of equity, such as removal, or insolvency, the court will not legalize the unlawful detention by stopping the funds in his hands. It is true, McKinley resides out of this State, but he so resided when complainant purchased the shares, and long before, as is shown by the bill and the proof, and complainant was fully advised of the fact when he purchased, having been his agent and attorney for many years. Under such circumstances, as against his liabilities for the funds in his hands, with respect to which his fiduciary relation still exists, a court of equity will not aid him.

5. The counsel for the defendant in error again insist, that the respondents should not be allowed to urge, that complainant could not purchase shares pending his agency, as the authority conferred to receive them at \$475 was an attempt to profit themselves at the expense of the *cestuis que trust*, and thus each party in turn invokes the rule, that a trustee shall not act for his own benefit and profit, in a contract on the subject of the trust. True, "it would be an extremely wrong thing," as the Lord Chancellor said in *Norris v. Le Neeve*, 3 Atk. Rep. 37, "to permit a trustee to use the information he gains as such trustee, by purchasing in for himself." See also, *Green v. Winter*, *supra*; 3 P. Wms. Rep. 249, n a.; *Morrell v. Paske*, 2 Atk. R. 52. He is considered as purchasing for the *cestuis que trust*, if he elect to avail himself of the purchase. But this record presents the case of trustees purchasing from the *cestuis que trust*, and although

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courts of equity regard such purchases with jealousy and suspicion, yet they are allowable if the purchaser make a full and fair disclosure, and take no improper advantage. *Kennedy v. Kennedy*, 2 Ala. Rep. 572; *Johnson v. Johnson*, 5 Ala. R. 90. The persons who have sold their shares are not the parties complaining, and it cannot be material to the interest of the complainant, whether the shares to which he lays no claim, are in the hands of the trustees, or of the original holders.

6. As to the expenses incurred by the trustees in the erection of a tavern and the public buildings for the county of Lauderdale, in the town of Florence, we do not think they can be placed to their credit in the accounting. There can be no question that such contribution of the funds tended greatly to increase the sale of the town lots, and perhaps the value of other property in the neighborhood of the town, but they were not warranted by the powers conferred on the trustees, by the articles of association under which they acted. The declaration of trust under which they acted, defines their powers with clearness, and nothing therein, either expressly or impliedly contained, could justify them in expending the trust money, or effects, in the erection of a court house, jail, clerk's offices, or tavern. And although these improvements were doubtless made in good faith, yet it is established that a trustee shall only be allowed for necessary expenditures. "It must be, and always has been the anxious wish of a court of chancery, to save a trustee from harm, while acting in good faith, but a misapplication of the trust property, by going out of the trust, can never be permitted to injure the *cestui que trust* without his consent." *Ch.; Greene v. Winter*, 1 Johns. Ch. R. 40; *Fontaine v. Millet*, 1 Ves. jr. 337; *Bostock v. Blackney*, 2 Bro. 653; *Wms.* 453; 3 Atk. Rep. 441; *Findley v. Wilson*, 3 Litt. Rep. 393.

It is proper to remark however, that the trustee should only be charged with the value of the tavern lots at the time of sale, and not the amount increased by the improvements. If the owner of the shares at the time these expenditures were

being made, gave his consent to this appropriation of the funds by the trustees, or if his consent could be implied from his silence, were he present and fully advised of the action of the trustees in that behalf, and interposing no objection, it is clear he would be estopped from insisting the loss should fall exclusively on the trustees, but his interest would be taxed with the loss *pro rata*, and this equitable right to contribute would follow his shares, and attach to them in the hands of his assignee. But we have carefully examined the evidence, and do not think it furnishes any authority for saying the shares are thus affected.

7. The chancellor also erred in permitting the witness, Pope, to give evidence at the hearing of the power of attorney from Buncker and Hazard to Montgomery, which complainant, as a subscribing witness thereto, had, by his voluntary act rendered himself incapable of proving. *Bennet v. Robison*, 3 Stew. & P. R. 227; 3 Phil. Ev. C, & H's Notes, 1267. Besides, it was not proper to receive *viva voce* proof at the hearing, without reasonable notice to the opposite party that such proof would be offered. *Consequa v. Fannin*, 2 Johns. C. Rep. 483-4; *Emerson v. Buckley & Stone*, 4 H. & Munf. Rep. 441.

8. To render the bill formal, and make the adjudication decisive of the interest of all the parties concerned, it is proper that all the persons who signed the declaration of trust, and who have participated in its execution, or their personal representatives, if they are dead, should have been made parties. They may be interested in several ways, and especially as to the misapplication of the trust funds to the erecting of public buildings, &c. *Story's Eq. Pl.* § 209. If however it should appear that the parties who have not been joined, are in no wise connected with the suit, not having taken upon themselves the execution of the trust, and that their interests are not to be affected by the decree, there would be no necessity for making them parties. But where a suit is brought to enforce a trust, and there are divers trustees, they should all be made parties; for all of them, says Judge

Story, have a community of interest, and otherwise there might be different suits brought against each trustee. Eq. Pl. § 210. We suggest whether the character of the bill in this case, is not different from a bill exhibited against one of several trustees, who are implicated in a common breach of trust. Story's Eq. 213; *Munch v. Cockrell*, 8 Sim. R. 219.

It is unnecessary to remand this cause, as we have satisfactorily shown, we believe, that were the party allowed to amend his bill, and aver a title derived through a devise by James Montgomery, it would make a new case, because it would amount to the assertion of a different agreement, or title, than the one set up in the present suit. Besides, after the proof on both sides has been taken, and the cause finally heard, it is too late to amend. The rule has never been carried so far within our knowledge as to permit a party under such circumstances, to amend as to substantial averments respecting his title. The statute authorizing the court to permit amendments any time before the hearing does not embrace the case. But this point is concluded by the adjudications of this court—*Bryant v. Peters*, 3 Ala. Rep. 171; *Evans v. Bolling*, 5 Ala. 555. See also, Story's Eq. Pl. § 336, 614, 886; *Mit. Pl. by Jeremy*, 55; *Lube's Eq. Pl.* 62; 1 *Daniell's Ch. Pr.* 478. The rule is less stringent in respect of parties, and the court may permit amendments as to clerical mistakes upon the trial. *Gill's heirs v. Cummings's heirs*, 6 Ala. Rep. 564; 2 Sch. & Lef. 11; *Rugely v. Harrison*, 10 Ala. Rep. 746.

The decree of the chancellor is reversed, and a decree is here rendered dismissing the bill. Let the plaintiff in error recover the costs of this court and of the chancery court.

MURPHY & BROCK v. ANDREWS & BROS.

1. The damages on a protested bill of exchange, drawn within this State, and payable in a sister State, is ten per cent.
2. Interest cannot be computed on the damages.

Error to the County Court of Montgomery.

ASSUMPSIT by the defendants in error against the plaintiffs in error, as indorsers of a bill of exchange, drawn in this State, payable at the Union Bank of Louisiana. Judgment being rendered by default, the defendants here assign for error, that damages were calculated by the clerk at fifteen instead of *ten per cent.*

R. DOUGHERTY, for the plaintiff in error, relied on the case of Crawford v. The Br. Bank at Mobile, 6 Ala. 12.

J. A. ELMORE, for the defendants in error.

By § 4, p. 381, Clay's Dig., (Damages,) the damages are 15 per cent.

By § 7, p. 382, damages on persons without the limits of the State, 10 per cent.

By § 11, p. 383, a bill like this is declared a foreign bill.

The question is, whether 10 or 15 per cent. damages are given by law.

The defendant in error, says, however, that he is entitled to interest on the damages. See Lloyd v. McGarr, 3 Penn. 474.

COLLIER, C. J.—The act of 1807 provides, that “on all bills of exchange drawn upon any person resident within the United States, and out of this State, which shall be returned protested, the damages shall be fifteen per cent. on the sum drawn for, and upon all bills, in like manner drawn upon residents out of the jurisdiction of the United States, being

protested, the damages shall be twenty per cent. on the sum mentioned in said bills respectively, and all charges incident thereto, with lawful interest as aforesaid, until the same be paid." Clay's Dig. 381, § 4. By the act of 1812, it is enacted, that "on all inland bills of exchange, on persons without the limits of this State, the damages, on protest for non-payment, shall be ten per cent., besides legal interest, from and after the date of such protest, any thing contained in the 5th section of the act to render promissory notes and cotton receipts negotiable, and for other purposes, to the contrary notwithstanding." Id. 382, § 7. The section here referred to, is the one first above recited; and the question now presented upon these two enactments is, whether the latter does not repeal the former, in respect to bills payable out of this State, but in the United States.

As to bills "drawn upon persons resident out of the jurisdiction of the United States," there can be no doubt but the 5th section is unaffected by any thing contained in the act of 1812, and hence it was retained in *Aikin's Digest*. But as to bills payable in a sister State, we cannot doubt, but it is abrogated. The act of 1807, uses the term "resident," in speaking of the drawee, yet it may be questioned whether it should be restricted to one who had a permanent home in another State; be this however as it may, the latter enactment contains language more comprehensive, and extends to all persons on whom bills are drawn, "without the limits of this State," whether "resident" at the place where the bill is payable, or not. This has been the practical construction of the act of 1812, and if the question were one of doubt, should be permitted to exert no inconsiderable influence.

2. It is insisted for the plaintiff in error, that the holder of a protested bill is entitled to recover interest, not only upon the amount expressed on its face, but on the damages given by statute. In *Lloyd v. McGarr*, 3 Penn. State Rep. 474, it was decided, that in an action against the drawer or indorser of a bill, that such was the law. But in *Rowland v. Hoover*, 2 How. Miss. Rep. 769, a conclusion directly the reverse was

attained. Our statute furnishes no warrant for the recovery of interest on the damages—it gives damages, “besides legal interest;” that is, in addition to the interest *on the bill* after its dishonor. The damages are contingent and accessorial, and cannot, upon any principle of legal analogy, draw interest. It is intended to compensate the holder of the bill for the loss he may sustain by the failure to meet it at maturity, and perhaps as a penalty to enforce punctuality in the payment of this description of mercantile security. When a judgment is rendered for the damages, they then, and not sooner, become part of the principal debt, and after that period, they draw interest. The error in the addition of fifteen instead of ten per cent. is a mere clerical misprision, according to the act of 1824, and the judgment will be accordingly amended at the cost of the plaintiff in error.

HALL v. CHENAULT.

1. One to whom money is paid by mistake, may, when suit is brought to recover it back, offset any claim he has against the person so paying it.
2. An administrator, who has made a final settlement, and who has been charged with the amount of a note due his intestate, may, when sued by the maker of the note, offset the amount due upon it.

Writ of Error to the Circuit Court of St. Clair. Before the Hon. G. D. Shortridge.

THIS was an appeal from a justice of the peace to the circuit court; and the amount being under \$20, was tried by the court, without a jury. A bill of exceptions was taken to the judgment of the court, which brings to view the evidence, and on which the circuit court rendered judgment in favor of the defendant in error for \$10.

The evidence was, the defendant in error, supposing that the plaintiff was the purchaser of his land at sheriff sale, tendered him the money, say \$30, and counted it out, with the view to redeem it. The plaintiff in error took \$13 of it, and told the defendant he would retain this in payment of a note held by the plaintiff in error, against the defendant in error, but stated to him, that he was not the purchaser of his land, informed him who was; the defendant redeemed the land from the purchaser, and sued the defendant to recover back the \$13 retained by the plaintiff. The plaintiff in error then proved, that Robert Johnson, and the defendant in error, executed to him, as the administrator of Henry Hall, deceased, a note for \$56 37, dated 2d January, 1844, and due at twelve months from date; on which note was a credit of \$45 35. That the note was given on the purchase of property belonging to said Henry Hall, deceased. The defendant was the surety of Johnson on the note. It was further shown, that the plaintiff in error had come to a final settlement with the orphans' court of St. Clair county, as the administrator of said Henry Hall, deceased, and in such settlement, had been charged by the final decree of the court, with the entire amount of the note, and that ever since the plaintiff in error has held the note as his own, in his individual capacity. The plaintiff also proved, that the defendant in error owed him \$2 on another transaction, and \$81 by way of costs.

This was all the evidence, and the judgment being for the defendant in error, it is here assigned for error, that the court erred in rendering judgment for the defendant.

RICE, for the plaintiff in error.

MORGAN, contra.

1. The statute cited by the plaintiff's counsel does not alter the common law right of a party to a suit refusing to become a witness; and it matters not that no law exists authorizing discoveries in suits before justices of the peace—there being no such law cannot affect the rights of parties. Dig. 314, § 10.

2. The statute allowing judges of superior courts to try appeals without the intervention of a jury, where the amount is under \$20, does not deprive the plaintiff, in such a case, of the right to insist upon notice of a set-off relied upon by the defendant. In this case there were no pleadings, and no notice. Dig. 314, § 10.

3. Was the note offered in evidence, a legal set-off to plaintiff's demand?

DARGAN, J.—It is very clear, that the circuit court erred in rendering judgment for the plaintiff below. In the trial of appeals, under \$20, there are no pleadings made up, and all the evidence offered, is to be considered as offered under a proper state of pleadings; and if sufficient, under any state of correct pleadings, to defeat the plaintiff's action, the court should not render judgment for the plaintiff. The residue due on the note from Johnson and the defendant in error to the plaintiff, was clearly a good off-set. It was given, it is true, to the plaintiff in error, as the administrator of Henry Hall, deceased; and this court has decided, that if a note is given to an administrator, on the sale of the property of his intestate, and he is afterwards removed from office as administrator, and another person is appointed administrator *de bonis non*, that the administrator in chief cannot sue on this note. See *Denham v. Grant*, decided at the last term.

But in this case, the administrator had come to a final settlement with the orphans' court, and had been charged with the full amount of this note by the decree, and he afterwards retained it as his own property. Under such circumstances, he could maintain a suit on it, and it was a good set-off. Saying nothing about the \$81 cost, the amount of this note, added to the \$2, would have amounted to more than the plaintiff's demand, and therefore the court erred in rendering judgment for the plaintiff, in the court below.

Let the judgment be reversed, and the cause remanded.

CHILTON, J., not sitting.

HENDERSON v. MABRY.

1. When the facts are clear, and undisputed, the court may charge directly upon them, without hypothesis; and where the question is, whether the fact that there was no change of the possession, after an absolute sale of personal property, has been sufficiently explained, so as to repel the inference of fraud, may instruct the jury, that the facts, if true, do afford such explanation.
2. A school master, with boarders in his house, and whose wife was in feeble health, being deeply embarrassed, sold five slaves for their full value, the money to be paid to the creditors of the vendor, with an agreement, that one of the slaves should remain in the family of the vendor, until the end of the year, she being the cook, and the only servant remaining after the sale. Held, that these facts, sufficiently repelled the inference of fraud, arising from the retention of the possession after the sale.

Error to the Circuit Court of Dallas. Before the Hon. E. Pickens.

THE facts of the case sufficiently appear from the opinion of the court.

W. H. FELLOWS and N. S. GRAHAM, for plaintiff in error.

The sale in this case has all the usual badges of a legal fraud.

1. A debtor in failing circumstances conveys all his property to his relation for a consideration to be paid; and after the sale, which is absolute on its face, retains the possession. And the fact that specie was demanded on an execution, is a prominent inducement to the sale. The sale also was secret. *Hobbs v. Bibb*, 2 Stew. 54; *Ayres v. Moore*, Id. 336; *Borland v. Walker*, 7 Ala. R. 277; *P. & M. Bank v. Borland*, 5 Ala. R. 531, 549; *Borland v. Mayo*, 8 Ala. R. 105; *Ibid.* 114, 115.

2. The special circumstances in evidence were not suffi-

cient to rebut the presumption of fraud. *Borland v. Mayo*, 8 Ala. 105, 106, and 115; *Hanford v. Artcher*, 4 Hill's N. Y. R. 282, 283, per Walworth, chancellor; *Butler v. Van Wyck*, 1 Hill's N. Y. R. 440, per Cowan, J.; *Ibid.* 450, 451, 456, per Bronson, J.; 43 vol. Law Lib. p. 40 to 60.

3. A sale void *ab initio* for fraud, cannot acquire validity against creditors by a subsequent payment of more than the amount stipulated. *Borland v. Mayo*, 8 Ala. 115, 116. One of the rebutting circumstances was impossible to be true.

J. W. LAPSLEY, for defendant in error.

The defendant in error makes the following points. The questions arise on the bill of exceptions:

1. It is shown by the proof that the sale was fair and *bona fide* and for full consideration; and was not made for the purpose of defrauding or delaying creditors; therefore there is no presumption of fraud to explain. *Borland v. Walker*, 7 Ala. R. 278; *Terrell v. Green*, 11 Ala. R. 210.

2. Moreover, this was not an absolute sale, though called so by the witness, who proves the contract and terms of sale; that is, the sale was not absolute as respects the negro woman in controversy, for it is shown that it was a condition of the sale, and one of the terms, that the negro woman should continue in the possession of the vendor until January, when the possession was delivered. The continuance of the possession by the vendor until the end of the year, was therefore consistent with the terms of the sale. The contract was not consummated by delivery until January next after the sale; and this creditor having obtained no lien prior to that time, the sale is good against him.

3. It is shown that the creditors received the full benefit of the sale; that the negroes brought their full value; that all the proceeds of the sale went to the creditors, and so far from the sale being made for the hindrance and delay of creditors, it was expressly for their benefit, or such of them as the vendor preferred to have first paid; that the object of the sale was to discharge and satisfy as great an amount of the vendor's debts as possible. These facts appear from the proof set out in the bill of exceptions; and all go positively and

expressly to negative the idea of fraud, either actual or constructive.

4. But if the sale was absolute, and if any ground existed for the presumption of fraud from the fact that the woman remained in the possession of the vendor for a few months after the contract; the explanatory circumstances were, it is believed, beyond all question, sufficient to account for the non-delivery of the woman. It would be difficult, it seems to us, to imagine a case in which the continuance of possession after sale could be more reasonably and properly accounted for than was done in this case as shown by the proof set out in the bill of exceptions. *Blocker v. Burness*, 2 Ala. R. 354; *Ravesies v. Alston*, 5 Ala. R. 297; *Terry v. Belcher*, 1 Bailey's R. 568.

CHILTON, J.—In this case, there is no controversy as to the facts. But one witness, so far as we are advised by the bill of exceptions, was examined, and he, being the defendant in the attachment, and rendered incompetent to testify under the statute of this State, was permitted to give evidence by the consent of the respective parties. The charge of the court, which was excepted to, was, that the possession of the property in controversy, by the vendor after an absolute sale, was fraudulent as to creditors, but that the special circumstances in evidence before the jury, if true, were sufficient to rebut the presumption of fraud. This charge, had there been a conflict of proof upon the question of fraud, would perhaps have been improper, inasmuch as its effect would have been to withdraw from the consideration of the jury the weight and credibility of the doubtful, or conflicting proof. See *Boyd & Macon v. McIvor*, 11 Ala. Rep. 822. But as we have before stated, the proof was not of this character. The facts were clear and undisputed, and in such case it is proper that the court charge directly upon them, and give the law of the case as applicable to them, without hypothesis. In the case before us, the facts being ascertained, the question whether there was or was not fraud in the sale by the defendant in the attachment to the defendant in error, was a pure question of law, and the circuit court properly so regarded it. The question then occurs upon the charge

whether the peculiar circumstances shown by the witness, explaining the retention of the possession by the vendor, was sufficient to rebut the presumption of fraud arising out of that fact. To test its propriety, let us recur to the facts as stated in the bill of exceptions, which are briefly these: The defendant in the attachment owned five slaves—was largely involved in debt beyond his means of payment, one execution being then in the hands of the sheriff for \$550, upon which specie was demanded. He was by occupation a school teacher, and had a number of scholars boarding at his house, his wife being in very feeble health, and her otherwise delicate condition requiring the aid of some domestic assistance. Under these circumstances, he made an absolute sale of said slaves for the price of \$2,200, which is shown to have been their full value, to the claimant, who was his uncle, and to one Goodman. That the money was not to be paid to the defendant in the attachment, but the purchasers were first to extinguish the lien for the \$550, and were to pay the remainder of the money in discharge of debts due from the seller. It was understood between the parties at the time of sale, that the woman in controversy should remain with the family of the said defendant in attachment until the end of the year, she being the cook, and after the sale, the only servant on the place. The purchasers complied with the terms of their contract, and the slaves were delivered to them, except the woman, who remained with the vendor from March, 1842, the time of the sale, until the first of January following, when she was delivered to the claimant, who retained possession of her until the 17th of February, 1847, when she was levied on by the plaintiff's attachment. Moreover, the witness swears the sale was not intended by him to delay, hinder or defraud his creditors, but was induced by a desire to make them pay the largest possible amount of his liability to his creditors. These are the facts upon which the charge was predicated, and it is too clear to admit of doubt, that they fully warranted the court in giving the charge to which the exception was taken.

It is unnecessary to review the authorities which establish the principle, that the possession of the vendor, though inconsistent with the deed, may be explained, and the pre-

sumption of fraud which would otherwise arise, be repelled. *Blocker v. Burness*, 2 Ala. Rep. 354; *Ravesies v. Alston*, 5 Ala. Rep. 297; *Planters' & Merchants' Bank v. Borland*, 5 Ala. Rep. 531.

It is sufficient, that in this case the possession for a limited period is provided for by the parties at the time of the contract, and forms a part of it. But if the presumption of law was adverse to the claimant, by reason of the temporary possession of the vendor, the circumstances attending the transaction sufficiently dispel all suspicion of bad faith. The situation of the vendor, confined to his school, with numerous boarders, his wife enfeebled by disease, and left without a servant to assist her, and at a season of the year, when perhaps it would have been difficult to have procured one—all these may be supposed to have made a strong appeal to the kindness of the claimant, who was a relative. The law, which regards and scans with scrupulous vigilance every circumstance from which a legitimate inference of fraud or unfairness may be drawn, is at the same time, not so wanting in humanity as to forbid the alleviation of distress and suffering by *honest* means. To hold, that in this case the sale is invalid, because the purchaser left the slave in controversy, under the circumstances shown in evidence, a few months with his afflicted niece, to whom her services were indispensable, the transaction showing there was no secret trust inconsistent with good faith, or the rights of creditors, would be to stamp as a *fraud*, what by the law of God, as well as by the common consent of mankind, is esteemed as a virtue.

Let the judgment be affirmed.

HADJO, USE, &c. v. GOODEN.

1. A witness having sworn to facts, tending to prove a payment of the claim in suit, together with other demands, between the same parties, in October, 1834, it is not admissible to produce one of the claims referred to by the witness as being then paid, (but not the one in suit,) upon which was a credit, bearing date 1st February, 1835, either to discredit the witness, or to show that the claim sued on was a subsisting liability.
2. When proof has been adduced, that a witness had made contradictory statements, in respect to the facts he then deposed to, it is competent to sustain his credibility by proof of general good character.
3. A witness may be examined to prove character, who swears that he is acquainted with the general character for truth, of the witness assailed, in the neighborhood in which he lives, although he admits he was acquainted only with some of his neighbors, and had never heard any of them speak of his character for truth, or heard it called in question.

Error to the Circuit Court of Randolph. Before the Hon. G. Goldthwaite.

THIS was an action of debt at the suit of the plaintiff, in error, on a bill single for \$127 25. The cause being submitted to a jury, a verdict was returned for the defendant, and judgment was thereon rendered. Upon a bill of exceptions sealed at the plaintiff's instance, the following points are now presented for consideration. 1. Defendant introduced one Sharp as a witness, who testified, that in October, 1834, about two months after the writing declared on was executed, the nominal plaintiff, who is a Creek Indian, with four other Indians of the same tribe, to wit: Sally, Walla, Pinca, and Wadsworth, came to witness, and showed him the specialty in suit, and four other notes made by the defendant, payable to the other four Indians respectively. In a day or two afterwards, these five Indians met with defendant, had some conversation and transactions with him; immediately thereafter, witness saw the defendant have several notes in his hands, and the Indians remarked the defend-

ant was a good man, and had paid off the notes. On cross examination, witness stated, that a note made by the defendant, and attested by S. F. Clawson, dated 28th August, 1834, for the payment of \$61 25, one day after date, to *Walla*, was one of the five notes referred to. He also stated, that he had not seen this note since October, 1834, and had never seen, previous to the trial, an indorsement thereon as follows, viz: "Received on the within note, \$34 74. February 1st, 1835. A. ELSTON." He however knew A. Elston, to be an honest man, and that the indorsement was in his hand-writing. After the foregoing testimony was given, and the defendant had closed his evidence, the plaintiff offered to read to the jury the last mentioned note and indorsement, for the purpose of destroying or weakening the force of the evidence of Sharp, as to the payment of the note declared on; but the defendant objected to the admission of this evidence, and his objection was sustained.

2. In the course of the cross-examination of Sharp, the plaintiff asked him whether, on a trial in the circuit court of Benton, at the Fall term, 1842, in a suit on the note to Sally, against the present defendant, he did not testify, that he knew nothing about the note now in controversy, or any of the other notes, except that payable to Sally. Witness answered, that he did not recollect ever to have so testified, but thought he never did give testimony to that effect. Plaintiff then introduced one Kennedy, who testified that he had heard Sharp examined, on the trial of the case of Sally against the defendant, at the term of the court supposed by the cross-examination, when he testified that he did not know any thing about the note now sued on, or either of the others about which he had spoken, but the one payable to Sally. Here the plaintiff again closed his evidence, without attempting to prove any thing in respect to the general character of Sharpe. The defendant then proposed to prove the general character of Sharp for truth, that the witness offered was acquainted with it, and would believe him on oath. To this testimony the plaintiff objected, but his objection was overruled, and the evidence admitted.

3. Defendant then offered a witness, who stated on his examination in chief, that he was satisfied he was acquaint-

ed with the general character of the witness, Sharp, for truth, in the neighborhood in which he (Sharp) lived, and that he would believe him on oath. On cross-examination this witness stated he was acquainted with some of Sharp's neighbors, but not with all of them; he had never heard any of Sharp's neighbors speak of his character for truth, or known it to be called in question; he had never lived in Sharp's neighborhood, nor nearer to him than twelve miles. Plaintiff moved the court to exclude each portion of this witnesses testimony; but the court refused to exclude any part of it, which was given on the examination in chief.

S. F. RICE, for plaintiff in error.

L. E. PARSONS, for the defendant in error.

COLLIER, C. J.—1. The production of the defendant's note to "Walla," with the indorsement of a partial payment, dated in 1835, and subscribed by A. Elston, was not admissible to impair or destroy the effect of Sharp's testimony, that it had been paid in 1834. The payment of that note was not an inquiry within the issue. Although the witness stated he was informed by the payee that it was paid, yet if his information was incorrect, what he said could not in any manner disprove what was stated by the nominal plaintiff in the present case, as to the discharge of the note now in suit. The evidence proposed was *res inter alios*—does not appear to have been offered to impugn the veracity of Sharp, nor could it have had that effect. If it was material to ascertain whether the note to "Walla" was unpaid, then perhaps its possession by the payee, or some other person than the maker, might contribute something to show its subsisting liability.

2. The testimony adduced by the plaintiff, that Sharp, upon the trial of another cause in which he had been examined as a witness, denied that he knew any thing about the note now sought to be recovered, went to show that he made contradictory statements, and of course to impair, if not directly to assail his veracity. Under such circumstances, it was certainly allowable to sustain the credibility of the witness, by proof of his general character, and that he would be

believed on oath. 8 Porter's Rep. 314; 5 Cow. R. 314, 320; 1 Greenl. Ev. 521.

3. In *Sorrelle v. Craig*, 9 Ala. Rep. 534, we say, the regular mode of examining into the general character, is, to inquire of the witness whether he knows the general reputation of the person in question among his neighbors; and what that reputation is, and whether from such knowledge the witness would believe that person upon his oath. In answer to such evidence the other party may cross-examine those witnesses as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and by fresh evidence support the character of his own witness. The inquiry must be made as to general character where he is best known. It is not enough that the impeaching witness professes merely to state what he has heard others say; for those others may be but few. He must be able to state what is *generally* said of the person by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation, or character. And ordinarily the witness himself ought to come from the neighborhood of the person whose character is in question. If he is a stranger sent hither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries. See also 1 Greenl. Ev. 512-13; 1 Phil. Ev. 212; 11 Sergt. & R. Rep. 198; 14 Wend. Rep. 105.

In the case at bar, the witness stated that he was satisfied he was acquainted with Sharp's general character for truth in his (Sharp's) neighborhood, and that he would believe him on oath. On cross-examination he stated that he was acquainted with some of Sharp's neighbors, but not with all of them—he had never heard Sharp's neighbors speak of his character for truth, and had never known his character called in question—he never lived in Sharp's neighborhood, nor nearer to him than twelve miles.

Here the supporting witness avows a knowledge of Sharp's general character for truth in the neighborhood of the latter. It does not appear through *what* medium he became acquainted with it: although he was acquainted with some of his

neighbors, he never heard them speak of it, or his character questioned. If the plaintiff had thought proper, he might have cross-examined the witness more minutely and searchingly, and if possible entirely destroyed the effect of his evidence. To acquire a knowledge of a person's general character, it is not necessary to know *all* his neighbors, or to hear any one speak of his disposition to tell the truth, or his integrity drawn in question. His virtues may be universally acknowledged, and the bright spots so prominent that his reputation exhibits no dark traits. The veracity of such a man would rarely be spoken of, and if at all, in no other than terms of commendation. What then the witness stated on cross-examination, does not show his incompetency to support Sharp. Though he lived twelve miles distant from him, it does not appear that he did not often visit him, or the neighborhood, and hear many of his neighbors speak of him, and the estimate in which he was holden among them. The case upon this point is altogether unlike *Sorrelle v. Craig, ut supra*; for there the witness on cross-examination, disavowed all knowledge of the estimation in which the person impeached was held in the neighborhood of his residence.

There is then no error in the ruling of the circuit court, and its judgment is therefore affirmed.

CHILTON, J., having been of counsel, did not sit in this cause.

HUDSON v. DAILY.

1. The action of the primary court, in quashing, or refusing to quash, an attachment sued out as ancillary to the writ, cannot be inquired into upon a writ of error to the judgment. *Mandamus* is the proper remedy.
2. When the judgment of another State, is by the terms of the judgment, to

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carry interest at a given rate, from a specified time, the interest may be recovered in this State, without showing that by the statute law of the State in which the judgment was rendered, judgments carry interest.

3. A certificate designed to certify a record of another State, which recites, "I, A. K., *first* justice of the county court of M., in the State of Virginia, do hereby certify," &c. is not sufficient under the act of Congress, at least without proof, that by the law of that State, the *first*, or oldest justice of the court, was the chief justice, or presiding magistrate.

Writ of Error to the County Court of Marengo.

DAILY, sued Hudson in debt, and an ancillary attachment was issued, and returned. The defendant filed two pleas in abatement of the ancillary attachment—one that the plaintiff was a resident citizen of Virginia, the other, that no suit was commenced before the issuance of the attachment. To those pleas in abatement, there was a demurrer, which was sustained. The defendant then pleaded to the declaration, *ne unques executor*; a verdict and judgment was rendered for the plaintiff below. On the trial, a bill of exceptions was taken, which presents the following facts: The plaintiff offered in evidence, the transcript of a judgment as described in the declaration, in the following words: "Therefore, it is considered by the court, that the plaintiff recover of the defendant the sum of \$796 69, with interest thereon, to be computed at the rate of six per cent. from the 24th February, 1843, until paid. The plaintiff then offered in evidence, a transcript purporting to be the interest, or usury laws of Virginia, which is in the following language: "Be it enacted, &c. that no person shall, upon any contract, take directly, or indirectly, for the loan of any moneys, wares or merchandise, or other commodity, above the value of six dollars, for the forbearance of \$100, for a year, and all bonds, covenants, contracts, assurances and conveyances, for the payment or delivery of money or goods to be lent, on which a higher rate of interest is reserved, or taken, than is hereby allowed, shall be void, and after that rate, for a greater or lesser sum, or for a longer or shorter period."

The defendant objected to this proof, on the ground that it was no evidence, that judgments bore interest in Virginia ;

which objection was overruled, and the defendant excepted. In proof, that the plaintiff was executor of Samuel Daily, deceased, he introduced the transcript of letters testamentary, granted to him by the county court of Mecklenburg county, in the State of Virginia, which letters were certified by the clerk of said court. The certificate of the judge, or justice, is as follows: "I, Abram Keen, first justice of the county court of Mecklenburg, in the State of Virginia, do hereby certify, that Richard B. Baptiste, whose signature appears to the foregoing certificate, is, and was, clerk of our county court, at the time of signing the same, and that his certificate is in due form of law, and full faith and credit should be given to his acts as such clerk. Given under my hand and seal.

Signed,

ABRAM KEEN, [seal.]"

The letters testamentary, and the certificate thereto attached, had been duly recorded in the county court of Sumter county, in this State. The defendant objected to the reading of the letters testamentary, because it does not appear from the certificate of the justice, that he was either judge, chief justice, or presiding magistrate of said court. 2. Because it did not appear, that by law, said court had authority to grant letters testamentary. These objections were overruled.

The defendant requested the court to charge the jury, that the plaintiff was not entitled to recover interest on the cause of action, without proof, that by the laws of Virginia, judgments bore interest; and that the copy of the interest act, was no evidence of the fact. This request the court refused. The defendant also requested the court to charge, that the evidence was insufficient to show, that the plaintiff was executor, which the court refused, and charged, that the act produced and read was evidence that judgments bore six per cent. interest by the laws of Virginia. To all which the defendant excepted, and now assigns for error, the sustaining the demurrer to the pleas in abatement to the ancillary attachment, and the matters growing out of the bill of exceptions.

BROOKS, for the plaintiff in error.

1. The demurrer to the pleas in abatement ought not to have been sustained.

2. A non-resident plaintiff cannot sue out an attachment against a resident citizen. Clay's Dig. 54, 57.

3. The plaintiff below had no authority to sue out an ancillary attachment. Clay's Dig. 61.

4. The copy of the interest act of Virginia is no evidence that judgments bear interest in Virginia.

5. The record of the appointment of the plaintiff executor was not properly authenticated.

HENLEY, contra.

1. The statute is general in its terms, that whenever a suit shall be commenced, &c. the plaintiff may take out his attachment ancillary to the suit at law. Whoever then may sue, may take the benefit of the attachment. There is no exception, and the statute being remedial, is to be liberally construed. Executors and administrators appointed in other States, are authorised by our statutes to maintain any action which an executor appointed here could maintain. Clay's Dig. 227, § 31.

2. The certificate and seal which give verity to a record, (unless the record itself discloses the want of jurisdiction,) establish as well the right of the court to adjudicate the matter contained therein, as that such facts were adjudicated. That a decree admitting a will to record is a final decree, &c. see *Boyett, et al. v. Kerr*, 7 Ala. Rep. 9.

3. As to the authentication of the record, the act of Congress is not to be literally pursued. A substantial compliance is all that is required. Vide *Huff v. Campbell*, 1 Stew. Rep. 543. The expression "first justice" is certainly equivalent to that of "chief justice." First means pre-eminence of rank or station, giving the right to preside.

4. The right to recover interest is shown in, and forms a part of the judgment entry as much as the principal sum. 1 Rev. Code of Va. 508. But independent of this, the right to interest is fully shown by the law read in evidence. It shows what was the legal interest of Virginia, if it shows any thing. But even without the production of any law, interest on judgments is recoverable at common law. *Craw-*

ford v. Simonton's Ex'rs, 7 Porter, 110; Murray v. Cone, 8 Porter, 250.

DARGAN, J.—The action of the court below, on the ancillary attachment, cannot be reviewed in this court by writ of error. The *capias* is the process, on which the judgment is rendered. The ancillary attachment is intended to secure the property, or fund, out of which this judgment is to be satisfied; and although the court may err in its action on the ancillary attachment, yet there may be no error in the judgment. The writ of error is intended to review the judgment, and is brought for the purpose of reversing it; and if the court below should improperly quash an attachment, issued as ancillary to the writ, after the judgment was rendered for the plaintiff, in which there is no error, could he bring up the cause, and ask to have it reversed? The only mode by which the action of the court below, on an ancillary attachment, can be reviewed, is by a *mandamus*. This is the practice heretofore pursued by this court.

2. We are relieved from considering the question, whether the court erred in construing the interest act of Virginia. The judgment, by its own express terms, is to bear interest at six per cent. until paid, and the recovery of interest, is as much a part of the judgment, as any part of the principal. This renders it unnecessary to examine this charge, for whether right or wrong, the plaintiff in error could not have been injured by it.

But we come to the conclusion, that the court erred in permitting the record of the letters testamentary, granted to the defendant in error by the county court of Mecklenburg, to go to the jury as evidence. The certificate under which the plaintiff below offered the record of his letters testamentary, is in the following words:

"I, Abram Keen, *first* justice of the county court of Mecklenburg, in the State of Virginia, do hereby certify, that Richard Baptiste, whose signature appears to the foregoing certificate, is, and was clerk of our county court, at the date thereof; and that it is in due form of law, and full faith and credit should be given to his acts, as clerk. Given under my hand and seal.

ABRAM KEEN, [seal.]"

The act of Congress of May, 1790, provides, that the records and judicial proceedings of the courts of any State, shall be proved, or admitted, in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be one, together with the certificate of the *judge*, chief justice, or presiding magistrate, that the attestation of the clerk is in due form.

The language in this certificate is, "I, Abram Keen, *first* justice," &c. We do not think this certificate is in conformity with the requisitions of the act alluded to. The language of the act, is judge, chief justice, or presiding magistrate. We do not wish to be understood as laying down the rule, that the certificate of the judge must use the precise words of the statute; but when there is a departure from the statute, in the language of the certificate, the words, or language adopted, must not be equivocal, or capable of conveying any other idea than that of judge, chief justice, or presiding magistrate. Here, the term *first* justice, is used. Is he the presiding magistrate, or chief justice? or is he the *first* that was commissioned? or is it meant that his commission is older than either of the other justices? His commission may be the oldest, and yet it would not follow, from this, that he would be the chief justice, or the presiding magistrate, unless by statute the date of his commission would give him this position. But the bill of exceptions does not show, what the statute law of Virginia is, on this subject, or whether there is any. As the term used in the certificate may imply a different meaning than the terms chief justice, judge, or presiding magistrate, the certificate does not conform to the act of Congress, and therefore the judgment is reversed, and the cause remanded.

CARTER & LOGAN v. GARRETT.

1. Upon a bill filed for an injunction, against an alledged usurpation of the complainant's right to the exclusive privilege of a ferry, at a place designated, describing himself as the lessee of the ferry from the commissioners of the seat of justice for Bibb county, a body corporate, to whom the ferry was granted by the court of revenue and roads for said county, the complainant is not entitled to relief, having failed to prove the corporate character of the commissioners, or a lease from them to him; these facts being put in issue by the answer.
2. The execution of a bond by the persons styling themselves commissioners of the permanent seat of justice for Bibb county, is not proof of the fact as against third persons.

Error to the 20th Chancery District. Before the Hon. W. W. Mason, Chancellor.

THE facts of the case sufficiently appear from the opinion of the court.

A GRAHAM, for the plaintiffs in error.

No counsel for defendant.

CHILTON, J.—The bill in this case, which was filed by the defendant in error charges, that in the year 1831, the commissioners of the seat of justice of Bibb county, and who constitute a body corporate, applied to the commissioners' court of revenue and roads for said county, for license to establish a ferry at Centreville, in said county, across the Cahawba river, for the use and benefit of the county, which license was granted on the 2d May, 1841, and the rates of ferriage duly prescribed. That the commissioners to whom the license was granted entered into bond as required by law, and performed the duties of public ferrymen up to the — day of December, 1844, when they leased the ferry to defendant in error for the year 1845, at the price of \$720, and he indemnified the commissioners against any loss or liabil-

ity arising from his failure to perform his duty. That being in possession of the ferry, and properly exercising the duty required by law of such carriers, the plaintiffs in error, on the 10th January, 1845, without any authority from the commissioners of roads and revenue, established a ferry about three hundred yards above the ferry of said Garrett, on the same stream, and were exercising the privilege of public ferrymen for pay, thereby disturbing the defendant in error in the enjoyment of his privilege, and greatly lessening his profits. That plaintiffs in error have erected finger boards, directing travellers to their ferry, as the cheaper one, and as having better boat, banks, &c. That Logan and Carter are insolvent, so that a suit at law would be unavailing. That they entered into bond on the 8th January, 1845, and tendered it to the judge of the county court, which he disapproved, but allowed it to be spread on the record if the parties desired it, and which was thus recorded. The bill prays a perpetual injunction against the exercise of the privilege of ferrymen by plaintiffs in error, at the point designated, which was granted on the 3d February, 1845.

The defendants below answer the bill, and aver, that as tenants at will of the heirs of Mrs. Sarah F. Chotard, deceased, they have the right to exercise the privilege of keeping a ferry, (which right was granted to her in 1822, by the court of roads and revenue of Bibb county,) at the point where said ferry is now established. And they deny that the commissioners of the seat of justice had the capacity to receive and hold the franchise claimed to have been leased by Garrett. They also require proof of such lease, and insist that the commissioners' court had no authority to grant the privilege, as Mrs. Chotard owned the land embracing both banks of the river. Several witnesses were examined, who proved, that when the ferry was established in favor of the commissioners, Mrs. Chotard had a ferry where defendants below were running their boat, and that for want of patronage, the ferry was not kept up, but had been discontinued for some twelve or thirteen years.

The only record evidence introduced, and indeed the only evidence for the complainant below, were the records of

the court of roads and revenue, showing that on the 2d May, 1831, the commissioners for the permanent seat of justice of Bibb county, were authorized to establish a public ferry across the Cahawba river, at the point indicated by the order, and they were required to give bond, &c. Also, a copy of the bond executed by Samuel Davidson and George Howard, who style themselves commissioners of the seat of justice, with security, and which was duly approved and ordered to be recorded, dated the 14th January, 1832. There is no proof of the corporate character of the commissioners, nor of any lease to the complainant below.

It is most obvious that the complainant below totally failed to make out his case. There is no proof whatever as to the persons who executed the alledged lease to him, and this is put in issue by the answers. Nor is there any proof to be found in the record of who constituted the board of commissioners for the permanent seat of justice for Bibb county, except the mere recital in the bond given by Davidson, Howard, and Perkins, which describes the two former as commissioners. Whether they were in fact at any time commissioners, and if so, whether they held their office up to the time of the alledged lease, and executed it—or whether in fact any such lease was made by any one, are matters about which there is a total failure of proof.

It was incumbent on the complainant below not only to prove his lease, but to go further, and show, that the persons who executed it, had a right to the franchise alledged to be violated by defendants below. See 1 Daniell's Ch. Pr. 371. This was not done by the production of the record of the court of roads and revenue, showing that in May, 1831, a license to establish a ferry was granted "to the commissioners of the permanent seat of justice of Bibb county," and the execution of a bond some eight months thereafter, by two persons styling themselves such. Such being our view of the case, it is unnecessary to examine the other questions raised. Let the decree of the chancellor be reversed, and the bill be dismissed, and it is ordered that the defendant in error pay the cost of this court, and of the chancery court.

ADAMS v. BROUGHTON, ADM'R.—BANKS v. SAME.

1. A voluntary deed, delivered to the grantee, conveying to him slaves, reserving to the grantor a life estate, is operative at common law against purchasers, and subsequent creditors, and is also valid as between the grantee, and the personal representative of the grantor, although he dies in possession, and his estate is declared insolvent.
2. When such a deed is made in another State, and the property brought afterwards into this State by the grantor, there is no law requiring the deed, to be recorded.
3. Such an instrument, if made and delivered to a person in being, is a present gift passing the title immediately, and therefore not testamentary in its character.
4. A conveyance of slaves by deed by one residing in Georgia, reserving to the donor the possession of the slaves during his life, and not made in contemplation of a removal of the slaves to this State, is valid in this State, without the registration required by the statute of frauds.

Error to the Circuit Court of Marengo.

DETINUE by Broughton, as the administrator of Thomas Hightower, against Banks and Adams severally for certain slaves. Actions commenced in January, 1845. At the trial of the suit against Banks, the plaintiff made title to the slaves in controversy, under a deed of gift executed in the State of Georgia, in February, 1819, by one Joshua Hightower, by which, after reciting its consideration to be "the love and good will" of the grantor to his son, the plaintiff's intestate, conveyed the slaves in controversy, or the mothers of them, to the said son, "reserving to himself and his wife Polly the use and enjoyment of the slaves during his lifetime and the lifetime of his said wife." It was in proof that in 1820 or 1821, Joshua and Thomas Hightower both came to this State, where they continued to reside until their respective deaths. Thomas died in 1825, and Joshua in 1843, after the death of his wife Polly. During the period of Thomas's residence in this State, the slaves were a part of the time in his posses-

sion, and a part of the time in the possession of both the Hightowers. After the death of Thomas, although an administrator of his estate was appointed and acted, he did not take the slaves into possession, but they continued in the possession of Joshua, who controlled them apparently as owner during his lifetime. Debts were contracted by him on the faith of the property. In 1830, they were sold as his property by a constable, in virtue of executions from a justice's court, he being present, and making no objections to the sale. The defendant Banks, is the administrator of Joshua Hightower, and that estate has been declared insolvent. The defendant Adams is the purchaser of the slaves sold in 1830, and is the husband of a grand-daughter of Joshua Hightower. This defendant had heard it said in the family of Joshua, that a conveyance of some sort for some of his slaves had been made by him in Georgia to his son, but he neither knew what slaves were conveyed, nor had ever seen the deed. The deed was never recorded.

On this state of proof, the defendants asked the court to instruct the jury—

1. That the delivery of the deed recited, did not convey such a title as that the plaintiff, as administrator of Thomas Hightower, should recover.

2. That the deed is of a testamentary character, and no recovery could be had unless it was established as a will.

3. That in this State, the deed was void as against creditors and purchasers of or from Joshua Hightower, and if they believed Adams became the purchaser at constable's sale, without notice of any interest in Thomas Hightower's representatives, they should find in his favor.

These charges were refused, and the jury instructed—

4. That the instrument was a good and effectual deed of gift, and passed the title by its delivery. That the right of Thomas Hightower to sue did not accrue until the death of Polly and Joshua; but that after their deaths, the administrator of Thomas, if the deed was fairly made, though without any consideration, became entitled to recover the slaves thereby conveyed. And if the deed was made out of the State of Alabama, it was valid against the creditors and purchasers of and from Joshua Hightower, without being re-

corded. And that the defendant Adams, by his purchase, whether with or without notice, of the deed, acquired a right to the slaves only during the lives of Joshua and Polly Hightower.

The defendants excepted, and now assign that the court below erred in the charges given, as well as in its refusal to charge as requested.

A. R. MANNING and BROOKS, for plaintiff in error.

I. The writing, if valid at all, is a testamentary paper merely—"the just sentence of a man's will touching that which he would have done after his death." Swinburne on Wills; 1 Wms. on Ex'rs, 7. "A disposition of personal property, to take effect after death." 4 Kent's Com. 500. If such be the effect of an instrument, no matter what its form, or what the maker intended or supposed it to be, it is a will. 1 Wms. on Ex'rs, 53-4-5, and cases there cited; Shepard v. Nabors, 6 Ala. R. 631; Dunn and wife v. The Bank, 2 Ala. R. 155; Vernon v. Inabuit, 2 Brev. R. 411; Pitts v. Mangum, 2 Bail. R. 588; Crawford v. McElroy, 2 Spears' R. 230; Marshal v. Fulgham, 4 How. Miss. R. 220; Thompson v. Thompson, 2 Id. 737; Carradine v. Collins, 7 Smede & Mar. 432; Welch v. Kinnard, 1 Spears' Eq. Rep. 256.

In several of these cases, nothing but the reservations of life estates, prevented the instruments, which were in form deeds, and intended to be so, from operating as such.

To give such an one as the present effect as a deed of gift, is to create a very mischievous instrument, by which not only may the interests of creditors and purchasers be much endangered, but the object of the maker, to provide for a member of his family, may be, in many instances defeated. Besides being in effect an irrevocable will, in one aspect, it will be the fruitful source of domestic frauds and infelicity. See 1 Nott & Mc. 602.

2. This instrument is founded solely on love and affection. Its language in effect is, "I give you these slaves; but I do not give them to you till I die." It cannot be, by the common law, a deed of gift as contended. For "a gift or grant of chattels personal, is the act of transferring the

right and the possession, whereby one man renounces, and another *immediately* acquires all title and interest therein." 2 Black. Com. 355-6. To make a gift, the present property and the "command and dominion" must be transferred. 2 Kent, 438; Sims v. Sims's adm'r, 2 Ala. 117.

For, as the act proceeds from mere bounty, if the donor do not part with the "command and dominion" over the chattels, the common law would not require him so to do. Therefore, a gift by deed, (which is no more operative to transfer a title to personal property, than a parol agreement is—Marshall v. Fulgham, *supra*,) if valid without a delivery of the chattel, must convey a present property in—the "command and dominion" over it; the delivery of the deed then standing in the place of the thing given. Even an actual delivery of the chattel does not perfect the gift, unless the dominion over it be at the same time transferred. 2 Kent, 438; Sims v. Sims's adm'r, 2 Ala. 117; Durett v. Seawall, Id. 669; Reid v. Colcock, 1 N. & McC. 602; Pennington v. Gittings, 2 Gill & J. 214.

But our statute of frauds and fraudulent conveyances, in respect to subsequent purchasers, as well as creditors, does embrace personal chattels. (Wherefore the reasoning in the case of Bohn v. Headley, 7 Har. & J. 257, is in favor of plaintiff in error, Adams, instead of against him.) But another important change of the law is also, though only impliedly made by that act. It authorizes gifts of personal chattels to be made without a delivery of them. For such gifts are declared void as to creditors and subsequent purchasers only, unless they be by will or deed duly recorded, or "unless possession shall really and *bona fide* remain with the donee." This statute, adopted from Virginia in the very infancy of our territorial existence, (1803,) might make the law afterwards, what those who enacted it may possibly have thought it was before, and so perhaps justify the decision in the case of McRae v. Pegues, and one or two other similar ones.

3. If this instrument be a deed, the reservation is inconsistent with the premises, and therefore void. Ingram v. Porter, 4 McCord, 178; Vass and wife v. Hicks, 3 Murph. 493; Sutton v. Hallowell, 2 Dev. R. 186. Or, the limitation after the life estate would be void. Vernon v. Inabnit.

2 Brev. 411; Crawford v. McElroy, 2 Spears' R. 230; Graham v. Graham, 2 Hawks, 322; Foscue v. Foscue, 3 Ib. 538; Baldwin v. Joyner, 7 Iredell, 123. And in the former case, the plaintiff in error acquired a title by six years' possession, which may be proved under the general issue. 3 J. J. Marsh. 365.

4. The instrument, if a deed of gift, is void against creditors and purchasers without notice, especially since, if such deed at all, it is become so by a change of the common law, made by the courts, or by operation of statutes. Which change, therefore, must be made subject to the main object and policy of those statutes—the protection of *bona fide* creditors, and subject to the same policy of the common law. Cadogan v. Kennet, Cow. 434. By that law, creditors and purchasers without notice are not chargeable with the secret rights and equities of mere volunteers.

J. W. HENLEY and BYRD, for the defendant in error, insisted—

1. That the instrument set out in the bill of exceptions is a deed, because—1. It has the form of a deed, showing that the parties intended to make a deed. 2. That it was not only signed and sealed, but delivered also. 3. That it purports to be founded on a consideration—that of love and affection, from the father to the son.

2. That it was not a will, because—1. It wants the form of a will. 2. It does not purport to be made in contemplation of death. 3. That it does not purport to convey the whole property of the donor. 4. That it does not purport to convey property to all the children of the donor.

3. But it is said that it is rather a will than a deed, because its operation is postponed to the death of the donor. But we reply that such is not the effect of the instrument. That it takes effect immediately. By operation of the deed, the title to the slaves is at once divested out of the donor and vested in the donee. The deed is in the present tense, "I give and grant," and does not purport to postpone the passing of title beyond the time of its execution. It was only the possession of the property that was postponed to the death of the donor. But such a condition of things is en-

tirely consistent with the rules of law. It was nothing more than a conveyance to one in trust for the use of another during his life, remainder over to the trustee in fee. Nothing is more clear than that the title to property may be in one, and the use or enjoyment in another. Here the title is conveyed to the donee, but the use or enjoyment of the property is reserved to the donor for a limited period. The deed takes effect immediately, and not *in futuro*. Rice's Eq. Rep. 261.

That such instruments have been held to be deeds and not wills, see Howard's Ex'r v. Gartman, Florida Rep. 63, 85, 88; Bohn v. Headley, 7 Harris & J. 257 to 272; Hope v. Hutchins, 9 Gill & J. 77; Cairns and wife v. Marley, 2 Yer. 582; 1 Humphrey's Rep. 171, 173; McRae v. Pegues, 4 Ala. R. 158; Banks v. Marksburg, 3 Litt. Rep. 278; 1 Jar. on Wills, 11.

4. That the same rules which prevail in the creation of life estates, with remainder over in real property, govern also in relation to personal property, 2 Kent's Com. 352.

That it is competent for one owning lands to make a deed on consideration of love and affection, conveying his estate to his children after his death, reserving to himself the use and enjoyment during his life. That in such case, though the estate of the children is to commence *in futuro* so far as its enjoyment is concerned, yet the deed will be supported as a declaration to stand seized to the use of the grantor during his life, and to the children after his death. Simmons v. Augustin, 3 Port. 69; Ib. 94.

There is no reason why the same rule ought not to be held to apply in case of personal property, and if necessary to support the deed, that the court would hold the donee a trustee for the donor during his life, and at his death to take the property discharged of the trust.

5. In the cases cited on the other side, from 2 Bailey and 12 N. H. 371, the gift was by parol, and not by deed. And the reservation of a use during life, or even for a day, was wholly inconsistent with the gift, whose essence was, the delivery of possession.

In the case of Sheppard v. Nabors, 6 Ala. Rep. 631, it is insisted, that the case is authority no further than that, in

that case, the plaintiffs were not entitled to recover, and that result would flow, whether the instrument had been declared a deed or a will. If the court held it to be a deed, it was clear that only such of the children of Winney Sheppard as were alive at the making of the deed, could take under it, but as the action was brought in the names of many children born after that time, as well as those born before, a recovery could not be had under the instrument as a deed. But if the court had held it to be a will, it was equally clear that a recovery could not be had, as it had not been proved as a will. It was therefore unnecessary to decide the character of the instrument.

6. That it was not necessary to record the deed in this State, as it was made in the State of Georgia; nor was it necessary to record it there, as it is not shown that by the laws of that State a record was necessary.

The statute of frauds cannot be held to apply to it, as the parties to the deed, and the property conveyed by it, were all in Georgia when the deed was executed.

It was never held that the laws of a State extended beyond her own jurisdiction. The statute of frauds requires the record to be made in the county where the donor resides. The donor here lived in Clarke county, Georgia. It was necessary then to record the deed there, if at all, and that under the laws of Alabama—a position wholly unsupported by authority. Nor can it be contended, that on the removal of the property to this State, it was necessary to record the deed in the county where the parties resided. The statute regulates what instruments are to be recorded, on removing property into the State. It cannot be said that public policy can enlarge the operation of a statute. As this was neither a "mortgage, deed of trust, or other legal incumbrance," under the terms of the statute, there was no necessity to record it. *Swift v. Fitzhugh*, 9 Por. 39; *Price v. Price*, 5 Ala. R. 578; *Thomas & Howard v. Davis*, 6 Ala. R. 113; *Catterlin v. Hardy*, et al. 10 Ala. R. 511.

7. Banks cannot defend for the creditors of Joshua Hightower. *Marler v. Marler*, 6 Ala. R. 367.

GOLDTHWAITE, J.—1. The deed under which the plaintiff in these suits makes title having been made in the State of Georgia, at a time when the slaves were there, is the matter which causes the chief difficulty; for it seems to be conceded, the deed, under our statutes of frauds, is inoperative against creditors and purchasers, because it was not registered, and because there was no transfer of the possession of the slaves. It may admit of question, whether property brought within this State is not governed by our statute, but we do not now purpose to discuss this point, and shall confine our examination to ascertaining, whether, by the course of the common law, the delivery of a voluntary deed, conveying an estate in personal chattels, to be enjoyed after the death of the grant, is operative, either against his personal representatives, when he dies in possession, or against his creditors, or a subsequent purchaser from him.

Independent of decisions upon this subject, it would seem strange if one, by a secret act, which need be known to but three persons—i. e., the grantor, the grantee, and the witness—should be permitted to clog his visible property, so as to defeat those who should afterwards credit him upon the faith of his being the owner, or to whom he should afterwards sell it for a valuable consideration. If this was permitted, it is evident there would be no security for either creditor or purchaser, as nothing would be more easy than for one thus to dispose of his entire estate, and the consequence would be, the enjoyment by his donee of the estate freed from the claims of creditors. Our statute of frauds possibly permits a gift so made, although the possession is not transferred at the time to the donee, but then the deed must be acknowledged and registered as the act directs. I apprehend that a gift could not be so made by the course of the common law, and that without a change in possession, actual and notorious, at the time, no estate, as against a creditor, or subsequent purchaser *without notice*, would pass by the delivery of a deed. I say *without notice*, because I deem this clear, but do not intend to be understood as declaring that a subsequent purchase would be avoided, even by the fact of notice, for it admits of much doubt whether the

possession and ownership can be disunited without the express sanction of legislative enactments.

It is somewhat singular that no decision upon this subject as a common law question, is to be found in the English books. This is probably owing to the fact that numerous statutes inhibiting fraud were there passed at an early period. Of this class, though by no means the earliest, are 13 Eliz. ch. 5, and 27 Eliz. ch. 4, which cover every possible ground of fraud—the first being in favor of creditors, and the last in favor of purchasers. They are both said by Lord Mansfield to be declaratory of the common law. *Cadogan v. Kennet*, Cowp. 434. And this seems also to have been the opinion of Sir Edward Coke. Coke on Litt. 76, a, 290, b. Neither of those statutes, in terms, avoid transactions merely because they are *voluntary*—i. e., without valuable consideration—but only such as are *fraudulent*. It is evident therefore, when the courts avoided conveyances merely on the ground that there was no valuable consideration to sustain them, this must by the common law have been considered as actual fraud, wherever a creditor, or subsequent purchaser came in contact with the volunteer. Yet we must not be led away, to suppose the common law prevented an owner, whether of real or personal estate, from renouncing his dominion over it, and transferring it to another—provided this renunciation was coupled with an actual change in the possession, *bona fide* and not colorable. Under these statutes, however, the courts seem to have considered it imperative on them to decide against a voluntary conveyance, independent of the question of possession. In *Munn v. Wetmore*, 8 Term, 529, where the possession seems to have followed the deed, Lord Kenyon admitted, that if the deed was voluntary, the law says it was fraudulent. In *Otley v. Manning*, 9 East, 58, all the decisions prior in point of time are collated, and the conclusion was, a voluntary conveyance, without fraud, was *per se* void, under the statute, against a subsequent purchaser.

It is inconceivable that so harsh a construction could ever have been put on the statute, unless the previous law had denounced the same consequences against similar conveyances, where the possession did not follow the deed. With-

out reference to any statute, as giving the rule, it seems well settled, that even when a sale is made, it will be void against a creditor, unless there is a change of possession, actual or notorious. *Wendell v. Smith*, 1 Camp, 332; *Armstrong v. Baldeck*, Gow. 33. It is said *arguendo* by counsel, in *Bicknell v. Rolston*, Pr. Ch. 285, that he had known the law so ruled forty times at Guildhall; and Gibbs, C. J., in *Joseph v. Ingram*, 8 Taunt. 538, in a case where an exception to the general rule was allowed, admitted the principle was established, that if a man sells goods, and continues in possession, the sale is void. Nor do the decisions of *Kidd v. Rawlinson*, 2 B. & P. 59, and *Watkins v. Birch*, 4 Taunt. 523, affect this rule, as in them, although the possession continued as it was before the purchase, the sale was made by the sheriff. It is true, with us this rule, as to attaching creditors, has been somewhat modified, so that the possession is *per se* evidence of fraud; yet every one must perceive that a subsequent purchaser has just as strong an equity as the previous one, and when he acquires the possession with the purchase, ought not to be defeated by the previous secret transfer. In *Gardner v. Howland*, 2 Pick. 599, it is said by the court, that to complete a sale of a chattel, so that the vendee may hold it against a subsequent purchaser, ignorant of the former sale, a delivery is necessary.

If such rules are applicable to cases where a money consideration is paid by both parties, how greatly more are they called for when one of them is a mere volunteer? It has been supposed, that because here the estate was not to vest in the donee until a future day, the possession of the donor is consistent with the deed. Possibly, if the conveyance was sustained by a valuable consideration, this circumstance might create a distinction, as the decisions certainly seem to indicate that there may be a valid mortgage of personal chattels, without a change of possession, but in my judgment, this failing, it only aggravates the mischief to the creditor or purchaser, that the one having the pretended adverse right, has no interest at stake to cause him to proclaim his title.

What I have said, with the citations made, in my judgment is satisfactory to show that a grantee to whom personal

chattels are conveyed by a voluntary deed not accompanied with possession, has no right whatever by the course of the common law, against either a creditor of the grantor or a purchaser from him, without notice of the conveyance.

2. It remains to consider the effect of the deed as against the personal representative of the grantor. Assuming, for the present, that this instrument is a deed, as distinguished from a will, it appears to be settled, in this court and elsewhere, that it is operative against the grantor's personal representatives. *Marler v. Marler*, 6 Ala. Rep. 367, and cases there cited. When the case referred to was decided, we had examined that of *Bethel v. Stanhope*, Cro. El. 810, with which it seems at variance. It is to be remarked, that *Bethel v. Stanhope*, was followed, after a lapse of a few years, by *Hawes v. Leader*, Cro. Jas. 270, where it was determined the administrator of the fraudulent donor could not resist the suit of the donee. This latter decision seems free from objections to which the other is apparent, for it may be, although there are creditors more than sufficient to exhaust the assets in the hands of the administrator, that they will never pursue those in the hands of the donee. Independent of this, as the fraudulent donee is liable to creditors as executor *de son tort*, it appears inconsistent he should at the same time be liable to the suit of the rightful administrator. These considerations confirm the opinion held by us in the case cited, and we feel no inclination to depart from the rule then settled.

3. It is urged, however, that this deed is in legal effect nothing more than a will, as the estate cannot be conveyed by the grantee until after the death of the grantor. It may be conceded there is much apparent force in this argument, but it will not stand examination. Formerly it was the rule, that no estate in expectancy could be created either in goods or chattels, unless the entire estate passed out of the grantor at the same time. In accordance with this, we find it laid down in the older books that a man cannot reserve a less estate than he has already to himself, unless he parts with the whole and re-takes that less estate by way of use. *Cranmer's Case*, 3 Dyer, 309, b. But in modern times, the law has been modified so as to permit those estates to be created directly, which could formerly be created in an indirect way.

A very similar reservation to this, for the life of a grantor, of real estate was held good in *Simmons v. Augustin*, 3 Porter, 69, and we can perceive no sound reason why a similar principle should not obtain with respect to personal property, as it is conceded by all the modern writers the same effect could be obtained by a conveyance in trust. 2 Black. Com. 398; Harg. Notes 3 Coke Litt. 20 a. The American cases are numerous to show that such a settlement by deed is admissible. *Horn v. Gartner*, 1 Florida Rep. 63, and cases there cited. It being ascertained that such a disposition may be made by deed, it follows, that if the thing be absolutely granted, and there is a grantee to take, that the transfer of the title as between the grantor and grantee is complete by the delivery of the deed. The case of *Sheppard v. Nabors*, 6 Ala. R. 631, is different from this, because there, although the form of the deed was quite similar, there was no grantee *in esse* at the time of its execution, and it may be inferred from the report, there was no evidence of its delivery to any one as a deed. Here, as every essential of a deed is proved, we feel constrained to pronounce, that such is the legal effect of the instrument, and as such, it is binding upon the personal representative of the grantor.

The result of what I have said is, that in my judgment, the court below erred in its exposition of the law, so far as it affects the suit against Adams, and that it did not err in the charges in the suit against Banks.

ORMOND, J.—The deed which is to be construed in this case, is a voluntary deed from a father to his son, conveying, upon the consideration of natural love and affection, certain slaves; the donor reserving to himself the right to use and enjoy the slaves, during his life, and that of his wife.

The effect of this deed was to convey to the donee, immediately upon its delivery, the title to the slaves, the right to the possession being reserved to the donor. The instrument was not testamentary in its character, but became immediately operative upon its execution.

This deed being made in Georgia, it becomes necessary to consider what is its effect at common law. It is contended by my brother Goldthwaite, that it is fraudulent, and void,

by the common law, against creditors, whether prior, or subsequent to the deed, and also against subsequent purchasers without notice of the deed. He arrives at this conclusion, because the deed is voluntary, and there was no change of the possession.

It is admitted, there is no decision in the English books affirming this principle, and to my mind, this is a conclusive argument against its soundness, as it is impossible to suppose, that if the proposition be true, that the common law did not permit a transfer of the title to personal property, in any case, either absolutely or conditionally, without a change of the possession, that the books would not be full of cases illustrating the principle—it would indeed be found among the rudiments of the law.

Where there is an absolute sale of personal property, and no change of the possession, the law presumes it to be fraudulent, and this has been considered to be law ever since the decision of *Twine's case*. This presumption of law, rests upon the established course of dealing amongst men, and therefore when, after an absolute sale, the property is left with the vendor, it is, in the language of Lord Coke, “a sign of trust.” But when the sale is not absolute, but conditional, and by the contract of the parties, the possession is to be retained by the vendor, for a stipulated time, or until the happening of a certain event, no such presumption arises, because there is nothing incongruous between the contract of the parties, and their conduct; and therefore if the possession is where, by the terms of the contract it should be, it is not a sign, or badge of fraud. This was determined in *Edwards v. Harben*, 2 Term, 587, and has been recognized as law from that day to the present, both in England and the United States; and has been repeatedly recognized by this court. Our registry act, which requires deeds of trust, and other conditional sales to be recorded, does not give them validity, but imposes a condition, to which they were not subject by the common law—registration—the object of which being notice merely, they are valid, though not registered, against all who have notice.

It appears to be conceded, that if this deed was made upon a valuable consideration, it would be valid, though the pos-

session had been retained by the grantor; but if the retention of the possession by the owner, is a badge, or sign of fraud, it can make no difference, whether the deed was upon sufficient consideration, or was purely voluntary.

The statute of the 13th Elizabeth, declaring fraudulent conveyances void, in favor of creditors, and the 27th of Elizabeth, for the protection of purchasers, have been embodied in our statute of frauds, and it is supposed, that such a conveyance as this, is embraced by the former statute, and being voluntary, is in legal estimation fraudulent. A voluntary conveyance of property by one indebted at the time, is doubtless by force of this statute fraudulent, and void as to such creditors. There are also some cases, in which it has been held, that such conveyances are void as to subsequent creditors of the grantor, but the established doctrine at the present day, both in England and the United States, appears to be, that the statute applies only to creditors existing at the time, and not to such as become so, after the execution of the voluntary conveyance. This question is fully discussed, in *Wheaton v. Sexton*, 8 Wheaton, 229, where this conclusion is attained. See also *Glaister v. Hewer*, 8 Vesey, 200, and *Battersee v. Farrington*, 1 Swanston, 106. What is said by Lord Kenyon in *Nunn v. Williamson*, 8 Term, 529, has reference to the facts of the case then before the court, which was that of a debt existing at the time the conveyance was made, and was not intended to be applied to debts subsequently created. The case of *Otley v. Manning*, 9 East, 58, also relied on, has not in my judgment any application to this. That decision was made upon the 27th of Elizabeth, in reference to a purchaser for valuable consideration, after a voluntary conveyance, where it was held, in conformity with the established current of the English decisions, that such voluntary deed was fraudulent, and void, against a subsequent purchaser, though he had notice of the previous voluntary conveyance. The statute of the 27th Elizabeth, applies only to voluntary conveyances of land, and has not to my knowledge, ever been supposed to be applicable to conveyances of personal property.

But our statute of frauds furnishes conclusive proof, that it was not intended, by the enactment of the provisions of

the 13th Elizabeth, to embrace such a case as this, as in the very same section, provision is made for the protection of subsequent purchasers, and creditors, when the title is not with the possession, by requiring the instrument by which it is evidenced, to be proved and recorded.

That such instruments are valid at common law, and not affected by the statute of 13th Elizabeth, unless the donor is indebted at the time, or unless they are fraudulent in fact, see *Bohn v. Headley*, 7 H. & J. 257; *Hope v. Hutchings*, 9 G. & J. 77; *Cairns and wife v. Marley*, 2 Yerger, 582; *Johnson v. Mitchell*, 1 Humph. 171; *Banks v. Marksbury*, 3 Litt. 278.

This deed being executed out of this State, is not embraced by our registry acts, unless it be the act of 1823, requiring all property "mortgaged, or under any other legal incumbrance," removed from any other State to this, to be registered within twelve months after such removal. *Clay's Dig.* 255, § 4. In *Swift v. Fitzhugh*, 9 Porter, 39, we held, that a postnuptial contract executed in Virginia, conveying slaves and other property in trust for the wife, was not a legal incumbrance, within this statute. The plain meaning of the statute is, property incumbered for the payment of debts, of which an incumbrance by way of mortgage is put as an example, and cannot reach a case, where the person in possession was entitled to an estate for life, with remainder to another. Besides, the deed was made in 1819, and the slaves brought to this State in 1820, or 1821, whilst the act in question, which was passed in 1823, expressly exempts from its operation, all mortgages, deeds of trust, or other legal incumbrances, existing at the time of the passage thereof.

From this it results, that as the deed was valid at common law, and was not required to be registered by any law of this State, a purchaser from the tenant of the life estate, became entitled only to the interest which he had in the slaves, and upon his death, the tenant in remainder, or his legal representatives were entitled to the slaves. The court therefore did not err in the charges given, or in those refused.

Judgments affirmed.

THE cause was re-argued at this term, on the petition of the plaintiff in error.

MANNING, for the plaintiff in error, enforced and re-asserted the positions previously taken by him, and especially insisted, that although the deed was made in Georgia, upon the property being brought into this State, it was affected by the statute of frauds, and became inoperative as against the creditors of the donor, for want of registration.

BYRD and HENLEY, contra.

COLLIER, C. J.—We concur in the opinion heretofore delivered by Judge Ormond, that the deed by Joshua to Thomas Hightower, is good as a gift, though the donor during the life of himself and wife reserved the enjoyment of the services of the slaves. *Hope v. Hutchins*, 9 G. & Johns. Rep. 77; *Abbott v. Williams*, 2 Brev. Rep. 38; *Vernon v. Inabnit*, Ib. 411; *Hunt v. Davis*, 3 Dev. & Bat. Rep. 42; *Benton v. Pope*, 5 Hump. R. 392.

It is however contended, that although the gift may have been good in Georgia, it became inoperative in this State, when the slaves were removed here, as against the donor's creditors; because the deed was not registered according to the provisions of the second section of the statute of frauds. That section, so far as it is material to notice it, is as follows, viz: "If any conveyance be of goods and chattels, and be not on consideration deemed valuable in the law, it shall be taken to be fraudulent within this act; unless the same be by will, duly proved and recorded; or by deed in writing, acknowledged and proved." If the deed be of goods and chattels only, then it must be acknowledged or proved by one or more witnesses in the circuit court, or county court, wherein one of the parties lives, within twelve months after the execution thereof; or unless possession shall really and *bona fide* remain with the donee. And in like manner, where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of three years, without demand made and pursued by due

course of law, on the part of the pretended lender ; or where any reservation or limitation shall be pretended to have been made, of a use or property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid ; the same shall be taken as to the creditors and purchasers, of the persons aforesaid, so remaining in possession, to be fraudulent within this act ; and that the absolute property is with the possession ; unless such loan, reservation or limitation of use or property, were declared by will or deed, in writing, proved and recorded as aforesaid." Clay's Dig. 254, § 2.

It is obvious from the terms of the act, that it was never intended to apply where a deed was executed in another State, and the property embraced by it was there in the possession of one of the parties, or some third person, without an intended removal. Here, in addition to the deed being executed abroad, while the property was there, the parties themselves were non-residents, so that it was impossible to register the deed upon proof or acknowledgment, "in the circuit court, or county court, wherein one of the parties lives, [lived] within twelve months after the execution thereof."

We have said, that the deed was operative as a gift at *common law*, and in the absence of proof to the contrary, it must be intended that the common law prevails in Georgia. If this be so, there is no principle that made the registration of the deed in that State, essential to the protection of the interest of the donee against the creditors of the donor.

In Catterlin v. Hardy, et al. 10 Ala. Rep. 514, a deed was made in North Carolina, in 1831, by which a father professed to loan to his son, and the wife of the latter, certain slaves for their joint lives, and the life of the survivor of them ; and afterwards to go to the children, in absolute right. Held, that upon the removal of the slaves to this State, it was not necessary to register the deed, and that the remainder in favor of the children, was not an incumbrance on the estate of the son and daughter-in-law. This case might be regarded as an authority directly in point, if it appeared that the decision of the question noticed, was founded upon the construction of the second section of the statute of frauds ; but

from the language employed, it is most probable that the attention of the court was only called to the act of 1823, "to prevent fraudulent conveyances." Clay's Dig. 255, § 4.

It is a settled principle, that the laws of one State will not be recognized by another, if they are repugnant to its policy, or the legal interests of its citizens. Story's Confl. of Laws, 32. Nor will a contract made in one State be enforced in another, if it is immoral or unjust, or injurious to the rights, interest or convenience of the State or its citizens. National comity will not be allowed to operate to the prejudice of the State which acknowledges it. Id. 203, 271.

If a contract is void by the statute of frauds, at the place where it is made, because it was not evidenced by writing, it is void every where; but if it was good where it was made, though not conformable to the laws of the State in which it is attempted to be enforced, it will be recognized as valid. Story's Confl. of Laws, 219.

In the gift by the father to his son, with a reservation of an estate for life, there was certainly nothing immoral or unjust, or injurious to this State or its citizens. Such at least is the inference from the case as presented by the record, and if the reverse is true, it should have been proved at the trial, and the charge of the court prayed upon the facts. If the legislation or judicial decisions of Georgia, were adverse to the validity of the gift, they should have been shown in the circuit court, as matters of proof. The transaction in Georgia, we have seen, is not obnoxious to our statute of frauds, although the parties and property afterwards removed to this State; and it would be an unwarrantable restriction of national comity to refuse to give it effect here. We know of no legal warrant for an extension of the policy of the statute to a deed executed abroad, between non-residents, in respect to property not within the State; especially if, at the time, it is not intended to be brought here. The objection then, that the deed in question was not registered, cannot prevail, so as to defeat the gift, even in favor of the creditors of the donor.

PRICE v. SIMMONS, ADM'R.

1. Upon a writ of error sued out upon a final decree in the orphans' court against an administrator, he cannot assign for error, that he had been improperly removed from the administration, by a previous decree of the court.
2. An erroneous judgment, and award of execution, in favor of an administrator *de bonis non*, against a removed administrator, made previous to the passage of the act of 4th February, 1846, authorizing such a decree to be rendered, is not cured by the passage of that act.

Writ of Error to the Orphans' Court of Benton County.

THE plaintiff in error, by virtue of his office of sheriff of Benton county, was appointed administrator with the will annexed, of William Burns, deceased, by the orphans' court of Benton. He returned an inventory, and an account of sales. On the 14th day of January, 1842, the legatees under the will, made application to the orphans' court, to have the letters issued to the plaintiff in error revoked, and that James L. Simmons be appointed administrator *de bonis non*, with the will annexed. This application was granted, the letters granted to Price as sheriff were revoked, and Simmons appointed administrator *de bonis non*, on the same day. It does not appear from the record, that the plaintiff had any notice of these proceedings. Simmons having given bond and security, the plaintiff in error was ordered to pay over to him the assets in his hands.

On the 6th of September, 1844, the defendant in error filed his petition in the orphans' court, setting forth the facts of the appointment and removal of Price as administrator, his own appointment as administrator, and averring that Price yet had in his possession assets belonging to said estate, amounting to near \$3,000. The petition concludes with a prayer for a citation against Price, that he be required to make a final settlement of the estate, and that judgment be

rendered against him for the amount in his hands not accounted for. Citation was ordered, and served on Price, the plaintiff in error; he appeared, and the cause being continued from time to time, on the twenty-second November, 1844, he filed his accounts and vouchers, which show a balance in his hands of \$1,609 29. Amongst his vouchers, is a receipt to the plaintiff in error, by the defendant in error, for \$8,826 91. Publication was then ordered to be made, requiring the legatees under the will, and all others interested, to appear on the 3d Friday of January, 1845, and show cause why the administration of said Price should not be finally settled according to the accounts and vouchers on file. On the day appointed, Price and Simmons, and the parties interested under the will appeared, and a final settlement was made, and on the settlement, it was found that the plaintiff had in his hands the sum of \$1,982 69, money belonging to the estate, and thereupon a decree was rendered by the court in favor of James L. Simmons, administrator *de bonis non*, against Price, for the sum so ascertained to be in his hands; upon which decree execution was ordered to issue.

The errors assigned are—

1. The court erred in revoking the letters of administration to him, and in appointing the defendant in error administrator *de bonis non*, without notice to him.

2. The court erred in rendering a decree against him, in favor of the defendant in error as administrator *de bonis non*, and awarding execution thereon.

MORGAN, for the plaintiff in error.

Prior to the act of February 4, 1846, the orphans' court had no jurisdiction to render judgment in favor of an administrator *de bonis non*, and order execution thereon. 9 Ala. Rep. 721.

It was error to remove Price without notice. 11 Ala. 461.

RICE, contra.

DARGAN, J.—The plaintiff in error, cannot assign for error, on this record, the judgment of the orphans' court removing him from office without notice. This was done in

1842, and is a separate and distinct judgment, from the decree of final settlement, and to reverse which this writ of error was issued. The judgment of the orphans' court, if even erroneous, cannot now be reviewed on error, for the plaintiff was administrator by virtue of his office as sheriff, and when his office expired, his letters of administration ceased, or his authority as administrator ceased with his office. Besides, the statute of limitations is a bar to a writ of error, on the decree of the orphans' court, rendered 6th September, 1842: even if this decree was erroneous for want of notice, the consideration of which we waive, the plaintiff cannot review it. But the decree of the orphans' court, rendered January, 1845, on the final settlement in favor of Simmons, as administrator *de bonis non*, against the plaintiff in error, and awarding execution thereon, is erroneous.

In the case of Willis v. Willis, 9 Ala. Rep. 721, this court, after a full review of the statutes, determine, that if an administrator be removed, and an administrator *de bonis non* be appointed, and final settlement is made with the administrator in chief, and a decree is rendered against him in favor of the administrator *de bonis non*, and execution thereon is awarded, that such decree is erroneous. That it is not authorized by any statute, and cannot be supported. This decision was made at the January term, 1846, and on the 4th of February, 1846, to supply what the legislature supposed was a defect in the law, in this respect, a statute was passed, authorizing the orphans' court, on a final settlement with the administrator in chief, to render a decree against him, either in favor of the administrator *de bonis non*, or in favor of the heirs or distributees, as the court may see fit. The decree in this case being rendered before the passage of this statute, was erroneous at the time of its rendition, and this act does not relieve it of the error, and consequently, the decree is reversed.

DONELSON'S ADM'RS v. POSEY, ET AL.

1. A bill is not multifarious, which makes two trustees, claiming under different deeds, parties, they being trustees of the same property, and having a common interest in defeating the claim set up by the bill.
2. A deed made by one who from excessive intoxication is deprived of the use of his reason, so that he is incapable of giving his serious, deliberate consent to the act, may be avoided, both at law and in equity, though the party claiming under the deed may have had no agency in producing the drunkenness.
3. An allowance to a trustee, of twelve and a half per cent., by the terms of the deed, will not render it void, in the absence of proof that it was unconscientious.
4. A partner has no right, or share in the partnership property, until the partnership debts are paid, and each of the partners has the right to have the firm debts paid, before any of the partners, or their personal representatives, or any individual creditor of such partner, can claim any right or title thereto. Each partner has a *specific lien* on the partnership stock, not only for the amount of his share, but for all monies advanced by him, beyond that amount, for the use of the partnership; and each partner has the right to assert his equity in behalf of creditors.
5. An insolvent firm, will not be allowed to recover a debt from one who is liable to pay, and has paid a debt for the same firm.
6. The equitable right of a party to a set off, cannot be defeated by a transfer of the debt to a trustee.
7. In the absence of any special agreement between partners, for a division of the profits, and loss, the law implies that they were equally interested.

Error from the Lauderdale Chancery Court. Before the Hon. W. W. Mason, Chancellor.

The complainants, as the representatives of John Donelson, filed their bill in the chancery court of Lauderdale, and among other things, charged that the intestate, John Donelson, and one P. F. Pearson, now also deceased, were partners in merchandizing. That their said mercantile co-partnership commenced about July, 1833, and ended about the 1st of November, 1835, and was carried on under the firm name and style of P. F. Pearson & Co.

That about the 1st November, 1835, Donelson retired from the concern, and one John D. Coffee then entered into partnership with said Pearson, the said new firm taking the goods, wares and merchandize of the old firm, and assuming the payment of all the outstanding debts and liabilities of Pearson & Donelson. This new firm continued in business until about the 1st September 1837, when Coffee died, after which Pearson carried on the business alone, up to the 17th October, 1838—having taken the stock in trade, the bill charges he was liable to pay the debts of P. F. Pearson & Co. and Pearson & Donelson.

That at the period last named, Pearson failed, and executed a deed of trust to one Willis Pope, jr. for the benefit of one Andrew J. Hutchings, Francis Kemper, and the administrators of the estate of said John D. Coffee, viz: said Hutchings and one Robert W. Brahan. That the said deed of trust, as by its recital, proposed to secure said Hutchings against his liability for said Pearson, in the sum of \$15,000, and the said Kemper in the sum of \$3008, due from said Pearson to him, and the administrators of John D. Coffee in a large amount, which is stated as unknown.

This deed to Pope conveys only the accounts and notes made in 1838, and the merchandize on hand at the time of its execution.

On the 20th October, 1838, said Pearson executed a second deed of trust to one Sidney C. Posey, as trustee, conveying the same property theretofore conveyed in the first deed, and also all the notes and accounts due to said Pearson and to Pearson & Coffee, then due, which last deed was made to secure Robert W. Brahan against certain liabilities incurred for Pearson, and also to secure said administrators of John D. Coffee, in the sum of fifteen hundred dollars, due their intestate.

The bill further charges, that Pearson came to a settlement on the 1st October, 1838, of the amount due Coffee; the amount was settled at \$1,500, for which Pearson gave his note, and which was secured by the deed to Posey. That by this settlement, Pearson became the owner of all Coffee's interest in the business of Pearson & Coffee, and

that such was the understanding of Hutchings and Brahan, at the time of such settlement.

That there was no settlement between Pearson & Donelson, at the time Donelson withdrew from the firm—but a large sum was then due Donelson. That the capital paid into the concern by him amounted to.....\$5,000 00

That his share of profits on merchandize was.... 4,750 00

That his profits in a partnership cotton speculation was,..... 3,082 36

That on settlement of accounts between them, on the 1st March, 1839, the above was agreed on as correct, and adding interest upon the sums thus ascertained to be due up to that time, which was set down at..... 2,846 24

Making the total of Pearsons debit up to 1st March, 1839, the sum of.....10,825 60

The bill charges that accounts against said Donelson have been exhibited, made during the years 1834, '35, '36, '37, and 1838. That complainants have no personal knowledge of the correctness of said accounts, but found them among the papers of the intestate, as follows :

Account for merchandize in 1834,..... \$1696 86

Ac't for 1835, with P. F. Pearson & Co. \$1359 60

“ “ with Pearson & Coffee, 536 78

“ 1836, “ “ 1426 41

“ 1837, “ “ 876 78—2839 97

“ due P. F. Pearson, for 1837, 497 20

“ “ “ “ 1838, 1209 22—1706 42

Interest being added from the time the accounts fell due to 1st March, 1839, when the settlement was made..... 1449 83

Leaves the total amount of the sum to be credited to said Pearson,..... \$9,052 68

And assuming the account as stated to be correct, a balance was due Donelson, on the 1st March, '39, of.....\$1,772 92

That since the dissolution of the firm of P. F. Pearson & Co. complainants aver, that as administrators of Donelson, they have been compelled to pay, by suit, a large demand, the proper debt of Pearson & Coffee, but which was recov-

ered of them as Donelson's personal representatives, by reason of the failure of the firm to give the notice required by law of the dissolution of the firm of P. F. Pearson & Co. That said demand, so by them paid, was created for goods, wares and merchandize, then forming a part of the stock in trade.

That Pope and Posey, notwithstanding Pearson has died wholly insolvent, refuse to admit the judgment so obtained upon the demand last named, to be adjusted as an equitable demand, out of the effects of Pearson & Coffee. But they are claiming a large sum of complainants as the representatives of said Donelson. That said Pope, as trustee, claims to recover the accounts of Donelson, and refuses to settle by discount, by reason of the trust created by the deed aforesaid, and also another deed made to him, as he alledges in favor of one William Weakly. Complainants aver that said Pope had more effects, merchandize, and debts, independent of the demands against said Donelson, than would be sufficient to pay off and discharge the debts mentioned in the deeds of trust, and if said Pope has failed to pay off said debts, it has resulted from his own fault.

The bill further charges, that Pope and Posey, the trustees in the respective deeds, have, each of them, caused suits to be instituted against complainants in the name of Winston P. Pettus, the administrator of said P. F. Pearson, to recover the accounts, &c. aforesaid. That said Pope has also sued complainants as administrators of Donelson, in his own name, for \$169 27 for goods alledged to have been purchased at a sale made by him of the goods so assigned. That inasmuch as the said Pope has sufficient debts and effects exclusive of the demands against said Donelson's estate, to pay and satisfy the demands secured by the deed to him, and all expenses, complainants aver it is unjust to permit him to recover the demands sued for. That as to the suit of Posey, complainants aver they have a right in equity to set off their demand as administrators, against the claim of Pearson's trustee. That the debts embraced in Posey's deed are individual debts, and that their equity is superior to that of the creditors whom Posey represents.

The prayer of the bill is, that an account be taken between

the complainants, as the personal representatives of Donelson, and the said trustees and *cestuis que trust*, and the administrator of P. F. Pearson, so far as may be necessary to afford them equitable protection; and that an injunction be awarded against the prosecution of the suits at law, by the administrator of Pearson, for the use of Posey and Pope, and also against the suit of Pope, for the goods sold as above stated.

The defendants answered this bill, denying an indebtedness to complainants' intestate, on the part of Pearson, and denying their right to the equitable sets off claimed.

Afterwards, Stokely Donelson, one of the complainants, having resigned the administration, Eliza Donelson filed, by leave of the chancellor, her amended bill, charging, among other things, that Pearson, at the time of the execution of the several deeds of trust to Posey and Pope, was incapable, from the intemperate use of ardent spirits, of making a valid conveyance, as his mind was so much impaired, that he did not know the legal effect or obligation of such contracts. Besides, the amendment avers that the deed made to Pope for Hutchings's benefit was obtained by threats and menaces of personal violence, on the part of Hutchings. The amended bill avers, that the payment to the marshal of the U. States for the northern district of Alabama, of an execution issued upon a judgment rendered in the district court of the United States, at Huntsville, on the 23d November, 1841, in favor of Montelius & Fuller, for \$991 30, besides \$50 cost of suit, and the fees of the marshal, which judgment was rendered for the proper debt of Pearson & Coffee, on a note given in the name of P. F. Pearson & Co. to Joshua C. Oliver, for goods which said Pearson & Coffee purchased and received, eleven months after the dissolution of the firm of P. F. Pearson & Co. That the note upon which they were rendered liable, was dated 23d September, 1836, and was assigned by Oliver, the payee, to Montelius & Fuller. Complainant further avers, that she has been as such administratrix, compelled to pay another debt of Pearson & Coffee, created for borrowed money, and reduced to judgment in the circuit court of Lauderdale county, on the 7th April, 1843, in favor of B. F. Weakley, which debt, with the damages and interest.

paid by her, amounted to \$302 96 besides cost, amounting to some \$85.

Complainant avers several other judgments rendered against her, upon demands, as she alledges, after the dissolution of the firm of Pearson & Donelson, and properly chargeable to Pearson & Coffee—one to B. & N. Harris, which she has paid, amounting to \$2,021 40. Also, a judgment in favor of Ann Key, for \$1,719 14, which she has not yet, but will shortly have to pay.

The bill insists, that complainant's equity, which is that of the creditor, whose debts complainant has paid, is a superior equity for satisfaction out of the effects of the partnership, to the equity of Pearson's assignees. The amendment prays perpetuation of the injunction granted on the original bill, &c.

The defendants answer this amendment, and admit the intemperate habits of Pearson, but aver he was sober when the trust deeds were made. Also, deny the allegations that the demands paid by complainant, were the proper debts of Pearson & Coffee, but say the firm of P. F. Pearson & Co. continued up to 1837, for the purpose of settling the old business, borrowing money, &c.

The defendants also demur to the bill—1. Because there is no equity shown upon its face. 2. Because, they alledge, it is multifarious. The chancellor overruled the demurrer.

Various depositions were taken on both sides, which, so far as material, will be noticed in the opinion. The chancellor, on the final trial, dismissed the complainant's bill, and adjudged the cost to be levied of the effects of Donelson. This decree is assigned for error.

HOPKINS, with whom was NOOE, for the plaintiff in error, made the following points:

1. The deeds of assignment executed by Pearson, when from intoxication he was incapable of making a valid contract are void. *Swift v. Fitzhugh*, 9 Porter, 63; *Mordecai v. Tankersly*, 1 Ala. 102; *Prentice v. Achorn*, 2 Paige, 30; *Cook v. Clayworth*, 18 Vesey, 12.

2. Whatever sum Pearson owed Donelson for the capital and profits of the latter, in the firm—or for the share of Don-

elson in the speculation in cotton, was in the nature of an equitable debt, due to Donelson at the dissolution of the firm, for which he had no remedy but in a court of equity. 1 Ala. Rep. 521; 7 Id. 217. This equity of Donelson is older than that of Pope, which arises from the transfer to him of Donelson's debt to Pearson, created subsequently, and must be preferred to it, whether Pearson was solvent or not, when he transferred it to Pope as trustee, and as collateral security. 6 Dana's Rep. 306; 10 Peters's Rep. 179, 210; 8 Ala. Rep. 224.

3. As Donelson was compelled to pay three notes of the firm of Pearson & Coffee, from his failure to give notice of the dissolution of the firm of Pearson & Donelson, as a surety for the money thus paid, this claim did not accrue until he was compelled to pay, since the commencement of the suit at law, by Posey against him, and being a creditor of the firm of Pearson & Coffee, is equitably entitled to a preference over their individual creditors. *Lucas v. Atwood*, 2 Stew. 378; *Winston v. Ewing*, 1 Ala. 129; Story on Part. 513-19-20, 458.

4. The conveyance in trust, being for the benefit of the individual creditors of Pearson, Donelson, as a creditor of the firm, is entitled to a preference out of the assets of the firm, and of this right a court of equity only has cognizance. To show that Brahan, for whose benefit the assignment was made, was an individual creditor of Pearson, and that Coffee was discharged, they cited *Tom v. Goodrich*, 2 Johns. Rep. 213; Story on Part. 525.

5. A court of equity has jurisdiction in this case, because none of the claims of Donelson could be set off in the action at law. 8 Ala. 222; 3 Leigh, 698; 5 Id. 34; 2 Paige, 582; 6 Dana, 32, 305. So, upon the authority of these cases, the note made to Oliver before the dissolution of the firm of Pearson & Donelson, is an equitable set-off, as he was compelled to pay it, after the suit at common law commenced against him by Pearson, especially as Pearson was insolvent, when he made the conveyances in trust, which is the source of a new equity, ample to sustain the bill. See the authorities cited under this head. This fund under the control of the trustee, cannot be reached without making Posey a par-

ty, as well as Pope, as the former has an interest in the funds in the hands of the latter—the bill is not therefore multifarious for this cause. 2 Howard U. S. 642; 2 Ala. 573.

6. It was the duty of Pearson, the acting partner, to keep correct accounts; his omission to do so, rendered the proof offered competent. Story on Part. 278.

7. The improper commissions secured to the trustee in the deed, made it fraudulent on its face. 1 Fonb. Eq. 117, note 13; Ib. 118, note 2; Chesterfield v. Janssen, 2 Vesey, 155.

E. W. PECK and L. P. WALKER, contra.

The object of the bill is two fold—to set aside the deeds of assignment from the drunkenness of the grantor, Pearson, and to establish certain alledged claims as equitable off-sets.

1. The deeds cannot be set aside for the cause alledged, because drunkenness, like lunacy, or infancy, is a personal privilege, which is only available to the party himself, or those in privity with him. 13 Mass. 375; 2 Cowen, 552; 20 Johns. 478; 2 Hill on Real Property, 421, note a; 1 Eq. Dig. 401-2-3. Secondly, it should have been shown, that the drunkenness was excessive, and that the grantor was utterly deprived of his reason and understanding—1 Story's Eq. § 231; 4 Eq. Dig. 150, § 1; 1 Kinne's L. C. 333—and that the drunkenness was procured, and superinduced, by the party claiming under the deed—1 Vesey, 19; Fonb. Eq. 75; 1 Bibb, 406; 1 Powell on Cont. 18; 1 Madd. Chan. 239; 10 Yerger's R. 121; 18 Vesey, 12; 1 Story's Eq. 242-4—and the proof is wholly wanting in all these particulars.

2. The claims attempted to be set up as equitable sets off, are not mutual, or due to, and from the same persons, in the same right, which is essential to a set off, either at law, or in equity. 1 Porter, 232; 9 Id. 452; 5 Ala. 110; 3 Johns. C. 573; Id. 351; 4 Id. 11; 1 Cond. R. S. U. S. 417; 7 Porter, 549; Burge on Suretyship, 462; 10 Vesey, 105; *Ex parte Toogood*, 11 Vesey, 517. Equity does not allow a set-off, of a joint debt, against a separate one, or the converse, except under peculiar circumstances, which do not exist in this case. 2 Story's Eq. § 1437, note 3; 5 Cranch, 34; Burge on Suretyship, 463; 10 Vesey, 105.

3. There is no sufficient proof, that the note of Oliver,

was given by Pearson & Coffee for goods, purchased by them, but conceding such to be the fact, as it was not paid by Donelson, at the time the deeds of assignment were executed by Pearson, there was no subsisting liability to create an equity in favor of Donelson, and against the assignee. 7 Porter, 110; 8 Ala. 223. But conceding that all the notes paid by Donelson were the debts of Pearson & Coffee, yet that would not invest him with an equity, equal to that of the creditors represented by Posey & Pope, as the liability of Donelson was the result of his own laches, in failing to give notice of the dissolution of the partnership, and the omission of the administrator to defend at law.

4. As to the case of the Rail Road Co. v. Rhodes, 8 Ala. Rep. 206, it is respectfully submitted, that the law of the case is correctly expounded by Ormond, J. and in confirmation of his opinion, beg to refer to the following cases, showing that the determination of the majority of the court, was founded upon the liberal construction put upon the term "mutual credit" in the bankrupt law of England. Burge on Suretyship, 455-7, 462-3-4-7; Smith v. Hodson, 4 Term, 211; Atkinson v. Elliott, 7 Id. 378; Hankey v. Smith, 3 Id. 508; Rose v. Hart, 8 Taunton, 499; 8 Id. 156; Glennie v. Edwards, 4 Id. 775; *Ex parte* Wagstaffe, 13 Vesey, 65; Lanesborough v. Jones, 1 P. Wms. 325; Davies v. Wilkinson, 4 Bing. 578; Rose v. Sims, 1 B. & Ald. 521; Easum v. Cato, 5 B. & Ald. 861. But they contended, that the case was plainly distinguishable from this, as it is not shown that Coffee knew that the goods were purchased with a note of P. F. Pearson & Co., and unless he did know the fact, there was not even an implied assumpsit that he would refund, and Donelson could not by paying the debt without his consent, make himself his creditor.

5. They contended that where third persons, as in the present case, have acquired rights by an assignment, no equities attach except those existing at the time of the assignment, and no liabilities will be allowed as sets off against such persons, except those subsisting in the shape of actual debts, as contra-distinguished from contingent liabilities, against the assignor, at the date of the assignment. 2 Story's Eq. 656-8, 664, § 1436, note 1; 5 Paige, 592; 2 Sumner,

409; 3 Johns. C. 358; 1 Edwards Ch. 402; 2 Id. 73; 5 Mason, 202; Holcombe's Introduction, 284; Gay v. Gay, 10 Paige, 369.

6. Lastly, they contended that upon the proof, the case was with them.

CHILTON, J.—It is insisted by the counsel for the defendants in error, that the will is multifarious, as containing an improper joinder of distinct matters. Also that its objects are inconsistent and repugnant, because it seeks to set aside the deeds of trust made by Pearson to Messrs. Pope & Posey for fraud and incapacity on the part of Pearson, the grantor, and at the same time, prays relief which can only be granted by admitting the entire validity of both deeds. This inquiry becomes proper in this view of the case,—if the bill for *any* cause should have been dismissed, this court will not reverse the decree of the chancellor, because he may have failed to dismiss it for the true reason.

The *gravamen* of the bill is, that Pettus, the administrator of P. F. Pearson, is endeavoring to enforce collection of certain alledged demands due by account from the complainant's intestate, to P. F. Pearson and Pearson & Coffee in their lifetime, and against which complainant cannot defend at law; first, because of the nature of the subject matter of their defence, being, as is alledged, equitable sets off; second, because of the peculiar relation in which the parties stand to each other, representing partners in a late mercantile firm; third, because an account which can be alone appropriately had in equity, is required to be had, to define the rights of the respective parties; and fourth, that the demands are sued to the use of certain persons claiming them by virtue of trust deeds, executed by Pearson, which deeds, as against complainants, are charged to be inoperative, because they were obtained from him while intoxicated. This is one aspect of the bill, upon which complainant predicates her claim for relief. Another is, that complainant has been compelled to pay firm debts due by Pearson & Coffee, which debts should be a charge in equity upon the firm effects, and be preferred to the claims of the trustees; and, allowing the trust deeds

to be valid, there will still remain a surplus to be appropriated to the payment of complainant's demands, after satisfying the demands of the respective *cestuis que trust*. The objection for multifariousness, so common in modern practice, is not favored in courts of equity. These courts are desirous of preventing multiplicity of suits, by settling at one suit, what at law might require many actions to adjust. Their forms of proceeding are flexible. They bring all parties interested in the subject matter before them, that their rights may be protected, and the whole matter in controversy adjusted by one decree, adapted to the particular exigencies of the case. This desire, however, to avoid litigation, and prevent multiplicity of suits, is never carried so far as to burthen defendants with cost accruing in respect to uniting in one bill several matters wholly distinct, against one defendant, or several distinct matters against several defendants. Besides the accumulation of costs, such a practice would introduce great delay and confusion, and greatly impede the administration of justice. 1 Story's Eq. Pl. 225. Is the case at bar liable to this objection? "A bill," says Judge Story, "is not to be treated as multifarious because it joins two good causes of complaint, growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character." So also, where the defendants have *one* common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. Ib. 233. It is the practice for several judgment creditors to unite in one bill against their common debtor and his grantees, to remove impediments created by fraudulent sales made by the debtor to such grantees, although they take by separate conveyances, and no joint fraud in any one transaction is charged against them all. Brinkerhoff v. Brown, 6 Johns. Chan. Rep. 139; Fellows v. Fellows, 4 Cow. 682; Brown & Dimmock, et al. v. Bates, 10 Ala. R. 433. In Delfield v. Anderson, 7 Smedes & Mar. Rep. 630, a bill was filed to set aside several sales made under the same execution to different defendants, upon the ground of inadequacy of price, and a want of such interest as could be sold—held, upon demurrer, the bill was not multifarious. See also

Wright v. Shelton, et al. 1 S. & M. Ch. Rep. 399; Martin, Pleasants & Co. v. Glascock, et al. Ib. 17. In Varick v. Smith, 5 Paige's Rep. 160, it is said by Walworth, chancellor, a bill is not multifarious because two good causes of complaint arising out of the same transaction, are joined in one suit, in which all the defendants are interested in the same claim of right. This court has made several decisions upon the subject of multifariousness in a bill. In the case of Kennedy's Heirs and Executors v. Kennedy's Heirs, 2 Ala. Rep. 571, it is said, "a case against one defendant may be so entire as to be incapable of being prosecuted in several suits; and some other defendant may be a necessary party to some portion only of the case stated." In the latter case, multifariousness would not be an available objection. See also 3 Milne & Craig's Rep. 85. It is further added, the courts find it impracticable to lay down any inflexible rule upon this subject, but discourage the objection when it would defeat, rather than advance the ends of justice. See also Chapman v. Chuun, 5 Ala. Rep. 397.

In Mecham v. Williams, et al. 9 Ala. Rep. 842, it is held, that a bill is multifarious when there is no act charged in which all the defendants have participated, in committing a wrong upon the equitable estate of the complainants, and where it is shown they do not derive a title, or claim through a common source, affected with the complainants' equities. See also Coleman v. Broughton, 9 Ala. 351; Mariott & Hardesty v. Givens, 8 Ib. 694.

Applying the principles above ascertained to the case before us, we think the bill cannot be regarded as multifarious. The interest of the two trustees, Pope and Posey, is too closely united and blended to authorize the conclusion, that they have not a joint concern in defeating complainant's equities. Indeed, in one aspect of the bill, they are indispensable parties. The complainant alleges that if both their deeds be valid, there are effects enough conveyed to pay up the debts secured by them without collecting the accounts sued upon, out of her estate, and inasmuch as the deed to Posey embraces all the property conveyed by Pearson to Pope, and as both deeds provide for the security of the same demand to Coffee's administrators, it is evident, though

claiming under different deeds, they are trustees of the same property, and have a common interest in defeating the claims set up by the bill.

But if the property conveyed should not be sufficient to pay the debts, and both the trust deeds should stand, still, if complainant's equities are superior to those created by the deeds, the joint interest of the respective trustees will be affected. Each trustee is interested in seeing that the fund in the hands of the other is not diminished. Posey, because he takes by his deed what is not required to pay the debts in the deed to Pope, and the creditors in Pope's deed, if the funds fall short of paying them, may turn the administrators of Coffee, who have two securities, over to the assets in the hands of Posey, if they be sufficient, and thus increase their dividend.

But aside from this view, the bill alledging the right of equitable set off against the administrator of Pearson, to the extent of the demands claimed by him, it would be oppressive, and subserve no good end, to drive the complainant to as many suits as there are persons to whom the administrator intends making partition of the funds. Complainant's equity is against the administrator, and the opposing equities of the trustees, are in the nature of incumbrances set up to defeat the relief sought. The whole matter may well be adjusted in one suit. Neither is the bill repugnant as contended in the argument, but we must regard it as framed with a double aspect, so that if the courts should decide against complainant with respect to the trust deeds, she may be relieved allowing them to be valid. *Strange, et al. v. Watson*, 11 Ala. Rep. 325.

2. Coming then to the main question involved in this case, we will consider whether, from the bill, answers and proof, the complainant shows she is entitled to any relief, and if so, to what extent.

It is conceded that complainant's intestate made an account with the firm of P. F. Pearson & Co., of which he was then a member, in the years 1834-5, to the amount of \$3,056 46. That he also made an account with the firm of Pearson & Coffee, during the years '35-6-7, to the amount of \$2,839 97. That after the dissolution of the firm of

Pearson & Coffee, he made an account with Pearson individually, in the years '37 and 8, to the amount of \$1,706 42, of which account, \$1,209 22 was created in 1838.

The deed by Pearson to Pope, dated 17th October, 1838, conveys to the latter "all his book accounts, and books, notes, and demands, then in the hands of Pearson, and which were made since the first of January, 1838; also, his stock of goods, wares and merchandize then on hand, together with every thing appertaining thereto," &c. So that it is contended, this deed vested in Pope the equitable right to \$1,209 22, of the account made in 1838, by Donelson with Pearson.

The deed to the defendant, Posey, bears date the 20th October, '38, and without noticing the previous conveyance to Pope, Pearson transfers to Posey all his accounts and goods on hand, and various lots of land, &c., and other personal property. Under this deed Posey claims to hold for the purposes of his trust, the accounts made by Donelson prior to the year 1838, and actions are commenced in the name of Pettus, the administrator of Pearson, to recover upon said accounts, for the use of the respective trustees.

The demands which complainant sets up, and which she insists are of an equitable character, and should be preferred to the equity of the trustees are—First, demands against the firm of P. F. Pearson & Co., viz: \$1,000, balance of \$5,000 capital advanced—\$4,750, share of profits on merchandize—\$3,082 33, profits on partnership cotton speculation, realized by the firm; making the total sum due from Pearson to the complainant's intestate, at the dissolution of the firm, (1st November, 1835,) \$8,832 36.

To this sum complainant insists should be added the amount collected from her estate by Messrs. Montelius & Fuller, on a note assigned them by Joshua C. Oliver, dated 23d September, 1836, and which, with the interest and cost paid, amounted to \$1,198 45. Also, a debt paid Weakly, and a debt paid Benjamin Harris, both which debts it is alledged are the debts of Pearson & Coffee, and for which notes were given in the name of P. F. Pearson & Co.

Before considering the proof as applicable to these several claims, it is proper to remark, that the defendants have no personal knowledge of the state of accounts between the

parties, and their answers averring their want of information and casting upon the complainant the burthen of proof, do not require the same amount of testimony to sustain the allegations of the bill. In such case, this court has held one witness is sufficient to establish the truth of such charges. See *Gibbs & Labuzan v. Frost & Dickerson*, 4 Ala. Rep. 720.

Respecting the demands in favor of Donelson, we think the most of them very satisfactorily proven. All the members who composed the respective firms of P. F. Pearson & Co., and Pearson & Coffee have died. We are then compelled to resort to the best evidence which can be had under the circumstances, and it is natural to conclude that the books of the firm, and the persons engaged as the agents and clerks of the partners, would furnish the most reliable source for satisfactory evidence of their transactions. The witnesses Neander H. Rice, and W. Bassett, were the clerks; the former clerked for Pearson in 1832, and from thence continuously till 1836; the latter was clerk in 1834-5. These witnesses, in giving their depositions, had access to the books of P. F. Pearson & Co., and Pearson & Coffee. Their statements substantially agree, and in respect to the profits of the concern, they are corroborated by the proof of several of the merchants of Florence, where the business was carried on.

They substantially state, that the business of P. F. P. & Co. commenced in July, '33, and ended November, '35. That Donelson put into the concern, in cash, \$5,000, and shortly after the dissolution withdrew \$4,000, thus leaving \$1,000 balance of the said advance due him. That reasonable profits of the concern, as shown by the sales, and as coming within their knowledge, amounted to \$9,500, the sales being \$69,830 67. Thus leaving Donelson's share of profits \$4,750. They further show, that upon the dissolution of the firm of P. F. P. & Co., and the formation of the new firm of Pearson & Coffee, the stock of goods belonging to the first firm were invoiced and debited to the firm of P. & Coffee at the sum of \$12,175. That this debit, with \$1,752 57, which accrued in favor of P. F. P. & Co. on account of other transactions, were credited with \$6,143 72 paid by

P. & Coffee, thus leaving a balance due the firm of P. F. P. & Co. of \$7,783 79. The profits which accrued upon the transactions of the firm in the buying and selling cotton, are shown by the testimony of Hunt and Rice, as well as by the books, to have been \$3,082 36, which were received into the concern by Pearson.

We think it also sufficiently appears from the testimony, that the note given by Pearson, in the name of P. F. P. & Co., on the 23d September, 1836, to Joshua C. Oliver, for \$760 54, and by him assigned to Montelius & Fuller, was given for the proper debt of Pearson & Coffee. Rice states that the goods purchased of Oliver were invoiced to Pearson & Coffee; were received and sold by them, *and that he understood from them both that they were to pay for them.* Further, that these goods constituted no part of the stock sold by P. F. P. & Co. to P. & Coffee.

With respect to the demands to Weakly and Harris, the proof is silent as to their consideration, and as it appears that Pearson & Donelson continued the use of the firm name after their dissolution, for the purpose of borrowing money and settling up the outstanding debts of the firm; we are not prepared to say that these demands are chargeable to Pearson & Coffee, but must consider them as constituting debts due from the firm upon which they purport to create an obligation. As to the demand due to Key, the witness, Rice, shows this was for money borrowed by P. F. Pearson & Co. and charged upon their books.

Having ascertained the demands and cross demands of the respective parties involved in this controversy, we come to consider the objections to the trust deeds set up by the defendants.

It is not necessary, as seems to have been supposed by the chancellor, that a party, to avoid a deed upon the ground of incapacity caused by drunkenness, was superinduced by the party claiming the benefit under the deed. Some decided cases do indeed go to this extent, but the true, and more reasonable doctrine is, that if the grantor, from excessive intoxication, is deprived of the use of his reason and understanding, so that he is utterly incapable of giving his serious and deliberate consent to the act, the deed may be avoided, both

at law and in equity, and this irrespective of any agency the party claiming under the contract may have had in superinducing the drunkenness. 1 Story's Eq. 235, § 231, note 2, and authorities cited; 2 Aik. Rep. 167; 2 Har. & Johns. R. 421; 1 Hen. & Munf. Rep. 70. The act in such cases is wanting in an essential element in every contract, *the consent or agreement of the parties*. In this case however, the proof taken in connection with the answers of the trustees, and the parties interested under the deeds, clearly preponderates in favor of the grantor's capacity, and this view renders it unnecessary to examine the point raised in the argument, whether the complainant can question the validity of these deeds upon this ground.

So also, with respect to the compensation allowed the trustee, Pope, for his services in the execution of the trust, the proof is insufficient to show that the commission provided by the contract to be paid him, was unreasonable. That the compensation is more than is usually allowed for collecting and disbursing, &c., is certainly true, but we must take into account the character of the duties the trustee had to perform. He was to collect many, and perhaps small amounts; his duties embraced a settlement of the affairs of a dissipated and reckless man, whose business was doubtless confused, and difficult to arrange. Under these circumstances, and in the absence of proof that the allowance of 12½ per cent. was unconscionable, we do not feel authorized to hold that such a provision in the trust deed would render it void upon its face.

Allowing the trust deeds to stand as security for the debts therein specified, it remains to consider, what are the equitable rights of the parties, with respect to their several demands.

It is perfectly clear, that there having been no settlement made, or balance struck, between Pearson & Donelson, the latter could have maintained no action at law to recover what may have been due him from the firm of P. F. Pearson & Co., and that his only remedy was in a court of equity. *Philips v. Lockhart*, 1 Ala. Rep. 521.

The law is well settled, that no one of the partners has any right or share in the partnership property, except what

remains after the full discharge and satisfaction of all debts and liabilities of the partnership, and that each of the partners has a right to have the firm effects applied to the discharge of the firm debts and liabilities, before any of the partners, or his personal representatives, or any individual creditor of such partner can claim any right or title thereto. Story Part. 125, § 97, and authorities cited. It is also laid down as a general rule, that each of the partners has a *specific lien* on the partnership stock, not only for the amount of his share, but for monies advanced by him beyond that amount, for the use of the copartnership. Rigley v. Casey, 4 Har. & McH. Rep. 167; West v. Skip, 1 Ves. 142; Hoxie v. Carr, 1 Sum. R. 173; Ex parte Ruffin, 6 Ves. 119; Story on Part. 137; Coll. on Part. 65. Although the creditors of the firm, before reducing their demands to judgment, have no such equitable rights in respect to the firm effects, as will enable them to resort to a court of chancery to have such effects appropriated to the satisfaction of their claims, yet as the balance due the partners can only be ascertained after the settlement of the partnership debts, each partner has the right to assert his equity in behalf of creditors, and to invoke the aid of the court when necessary, in enforcing the application of the firm effects to the extinguishment of their claims. Per Lord Eldon, Ex parte Ruffin, 6 Ves. 119, 126.

Applying these general principles to the case at bar, it is manifest that upon the dissolution of the firm of P. F. Pearson & Co., Donelson, the retiring partner, in the absence of any controlling stipulation between the parties, had an equitable lien upon the effects for the amount due him from the firm, after the payment of the firm debts. If the firm of Pearson & Donelson sold the goods on hand at the time of the dissolution, to Pearson & Coffee, as appears by the testimony of Rice and Bassett, the clerks, whether the latter firm agreed, as is stated in the bill, to pay the debts of P. F. P. & Co., or not, their indebtedness for said goods is assets of the firm of P. F. P. & Co., and subject to the satisfaction of the demands against that firm. Exclusive however of this indebtedness, the firm of Pearson & Coffee owed Oliver for goods purchased by and in the name of P. F. Pearson & Co.

in September, 1835, shortly before the dissolution of that firm, but which goods were received by, and sold for the use of the firm of P. & Coffee. For this debt, Pearson executed the note of P. F. P. & Co., and the estate of Donelson was properly liable to Oliver for it, although in equity and good conscience it was the debt of Pearson & Coffee. This was not a contingent liability of Donelson, as was insisted upon in the argument, but we think it fairly deducible from the proof, that as a member of the firm of P. F. P. & Co. he was at law, as between himself and Oliver, primarily bound for the goods. Now, the firm of Pearson & Coffee being insolvent, through the personal representative of the surviving partner, (Pearson,) seek to recover at law an account made with them by Donelson, which it is proposed, as shown by the purposes of the trust, to appropriate to the individual debts of Pearson. In our opinion, there is a natural equity growing out of the transactions between these parties, which utterly forbids that the insolvent firm of Pearson & Coffee should recover from Donelson, when at the same time he is liable for that firm, (and which was actually paid before the hearing,) for demands justly due from it. This point was so fully considered by this court in the *Tuscumbia, Courtland and Decatur Rail Road Co. v. Rhodes, et al.* 8 Ala. R. 206, 226, that it is unnecessary again to examine the numerous decisions upon which the doctrine rests. The principles settled by that decision meet our unqualified approbation, and we think, accord with the decisions of the most respectable courts both in England and America.

The court of chancery deduces the nature of the liability existing between the parties, from all the facts and circumstances attending the transactions out of which such liability arose; the intent, and not the form of the contract, is that which this court endeavors to carry out, if consistent with equity. *Gordon v. Lewis*, 2 Sum. C. C. Rep. 143. Now as respects the creditor, (Oliver,) from whom the goods, constituting the consideration for the indebtedness, were purchased by P. F. P. & Co., that firm, as we have said, was primarily liable, but as between the two firms, the proof shows, that Pearson & Coffee, who received and sold the goods, were to pay for them. This the witness, Rice, proves

he understood from both the parties, and the bill of the goods was entered upon the invoice of said firm. Donelson then stood as sponsor for said firm, and in our opinion was entitled to be indemnified against his liability for said debt, out of the firm effects of Pearson & Coffee. *Nesbitt v. Smith*, 2 Bro. C. C. 579; *Autrobus v. Davidson*, 3 Meriv. Rep. 569; *Hungerford v. Hungerford*, Gill Eq. Rep. 67; *Burge on Surety*, 378. This equitable right attached as soon as the debt fell due and default was made in its payment.

The equitable rights of Donelson, as respects his indebtedness, cannot be affected by the assignment to Messrs. Pope and Posey. They take but an equity in the accounts against Donelson, and if both their equities were equally meritorious, that which is first in point of time is best in right. 10 Peters's Rep. 177. The equities of the complainant being first in point of time, must therefore be preferred. See also *Merrill v. Louther*, 6 Dana's Rep. 305; 8 Ala. Rep. 226.

We arrive at the conclusion that the administratrix of Donelson has the right to an account with the administrator of Pearson, to ascertain the balance due Donelson from said firm, in which accounting should be embraced the amount received into said concern as profits on their speculation in cotton, as well as all debts paid by said partners respectively, or their representatives, due and owing by said firm. As to the speculation in cotton, it is evident that was a transaction without the scope of the ordinary dealings of the firm, and in which another partner was engaged, and that a settlement of the accounts, &c. involved in that enterprise could not be made in the present bill. But such is not the effort of the complainant. The amount of profits was adjusted between the partners, and the net balance was received into the firm of P. F. P. & Co., and which then became so much stock in trade, subject to be accounted for on final settlement. An account should also be taken as to the amount due from Pearson & Coffee to P. F. Pearson & Co. and also as to amount due to Donelson for demands subsisting against said Pearson & Coffee, and for which he was liable at the date of filing the original bill; these several items being ascertained, as well as the amount of the account made by Donelson with P. F. Pearson, the equities of the parties should be thus ad-

justed: Whatever balance is due from Pearson's estate to Donelson's, upon a settlement of the firm account of P. F. Pearson & Co. shall be set off against Donelson's liability to Pearson; and if it appears, upon taking the account, that the firm of Pearson & Coffee is indebted to the firm of P. F. P. & Co., Donelson's share of such indebtedness is to be added to whatever amount he has paid, or for which his estate was liable at the time of the filing of this bill, and this amount will be set off against the liability of the estate of Donelson to Pearson & Coffee.

We have said nothing respecting the firm debts of P. F. Pearson & Co. as the record does not disclose any debts subsisting against said firm, but if such debts do exist, as Pearson's estate is insolvent and Donelson's estate liable for them, they furnish an additional reason for stopping the amount in the hands of Donelson's executrix, rather than a justification for their withdrawal of it, especially as it is proposed to apply the fund when received to individual demands against Pearson.

The indebtedness of Donelson seems to be the only assets of the firm of Pearson & Coffee which complainant can identify; beyond that the complainant's relief cannot extend, with respect to the indebtedness of that firm.

Let the decree of the chancellor be reversed, and the cause be remanded, that a reference may be awarded to the master to state the accounts between the parties, after which a final decree will be rendered, adjusting the rights of the parties as above indicated. It is proper also to state, that in taking the account as to the debts paid by Donelson's administratrix, or in judgment, none but the necessary cost can be allowed, and the large bills of cost, as exhibited in the record, as well as the supreme court cost and damages, should be disallowed, as unnecessary.

Further: There appears to be no evidence as to any special agreement between Pearson and Donelson respecting the division of the profits and loss of the concern, or the interest which the parties have in the capital stock on hand at the dissolution. In the absence of such agreement, the law implies they are equal partners, and entitled to moieties. Sto.

on Part. 31, and cases cited in note 3; Gould v. Gould, 6 Wend. Rep. 263; 9 Ala. 372.

We have deemed it unnecessary to review the various decisions referred to by the counsel for the defendants in error as applicable to the doctrine of set-off, and the inapplicability of those decisions of the English courts made under the influence of the bankrupt statutes, as furnishing correct guides in the proper construction of our statute of set-off. The case before us involves a principle of natural equity, growing out of the insolvency of Pearson & Coffee, fortified as it is by the lien of a retiring partner, which places it quite beyond the statute of set-off, and in our opinion calls loudly for the interposition of the power of the chancery court to prevent a threatened injury, which, if consummated, would be remediless. The equity of complainant's bill is upheld by many authorities. 1 Story's Eq. Jurisp. 630-1; Story on Part. 513, 519, 520; Calvit's Ex'rs v. Markham, et al. 3 How. (Miss.) Rep. 343; 8 Ala. Rep. 222; 5 Leigh's Rep. 34; 3 Ibid. 698; 1 Bibb, 519; 4 Monroe, 1; 5 J. J. Marshall, 659; 6 Dana's Rep. 32; Ibid. 305; Lindsay v. Jackson, (Walworth, Ch.) 2 Paige, 581-2; 2 Hamm. (Ohio) Rep. 320; 2 Eq. Cas. Abr. 10; 2 Vern. 117. To these many others might be added, but I forbear.

LYNCH v. BRAGG.

1. A surety when sued, may, with the consent of his principal, set off a debt due from the plaintiff to his principal.
2. An account furnished by the clerk of a steamboat, showing that a quantity of wood had been furnished, is competent testimony of a debt due from the steamer, although it may not state with precision the amount due.

Error to the County Court of Wilcox.

ASSUMPSIT by the defendant in error, before his honor D. W. Sterrett.

Upon the trial, as appears from a bill of exceptions, the defendant proved that he was surety upon the demand sued for, for one Robert H. Gregg, and then proved a written direction, from the plaintiff to Grigg, to furnish wood to the steamboat Dallas, to the amount of his indebtedness, if called for. He also produced, and offered to read a statement in writing by the plaintiff, showing the account of wood furnished by Gergg, as admitted by the steamboat, which on motion of the plaintiff's counsel was excluded, to which he excepted, and which is now assigned as error.

BETHEA and BECK, for the plaintiff in error.

C. C. SELLERS, for the defendant in error.

COLLIER, C. J.—If the evidence stated in the declaration went merely to establish a set off in favor of the principal on the note on which the defendant is a surety, it should have been admitted. In *Winston v. Metcalf*, 7 Ala. R. 837, it was said “the principal debtor is liable to indemnify his surety, whenever the latter pays the debt; and when the former has procured a valid set off, we perceive no sound reason why the surety should not be permitted, with his consent and concurrence, to enforce it, in the same manner as if the suit was against both jointly.” This decision was made under the influence of our statutes. If the “consent and concurrence” of the principal, that the defendant should avail himself of the account for wood furnished the steamer Dallas, could not be inferred from the possession of the account, it might have been shown by other proof, after the account itself had gone to the jury. The view which we take of the case, renders it unnecessary to inquire, whether the quantity of wood delivered, or the price at which it was sold was unliquidated, so that the account could not come in

under the plea of set off. Handley v. Dobson's Adm'r, 7 Ala. Rep. 359.

The request contained in the note of the plaintiff to Gregg, of the 27th December, 1846, to furnish the steamboat Dallas with wood to the amount (if called on) of what he was indebted to the plaintiff, with an assurance that the latter would be responsible to him for the same, entitled Gregg to demand as a *payment* on his indebtedness to the plaintiff, all the wood he furnished under the request. This seems to us to be a proposition which is illustrated by its statement. The note declared on was due nearly twelve months previous to the date of the request, and may well be intended to have been referred to by it. If it was a payment, it extinguished the note *pro tanto*, and the surety might well avail himself of it. The letter of the plaintiff to Gregg, under date the 16th March, 1847, contains a statement as furnished him by the clerk of the steamer, of the quantity of wood received by the boat from Gregg, a part, if not all of which had never been paid for. Conceding this letter did not show with precision the amount admitted by the Dallas to be due, yet no principle of law warranted its exclusion on this ground. Perhaps the defendant might have adduced other evidence on this point; but if he could not, the proof offered should have been allowed to go to the jury, whose province it was to explicate it, and educe such a conclusion as they conceived approximated truth.

It follows, that the judgment must be reversed, and the cause remanded.

WHITLOCK v. HEARD.

1. An agreement, by which mares and colts are placed with another to be fed during the winter, the stock to be liable for the expense of keeping them, and the bailee to have the power of selling them to pay the expense, does not merely give the bailee a lien on the stock for the expense of their keep, but by the terms of the contract, gives him the right to sell so much as may be necessary to discharge the debt due for their keeping. If he sell more than sufficient, it is a conversion, and for such excess he is liable in trover.
2. A purchase by the bailee himself, at a public sale by auction, is not absolutely void, but voidable at the election of the party, whose title is sought to be divested by such sale.

Error to the Circuit Court of Cherokee. Before the Hon. D. Coleman.

TROVER, by the plaintiff in error, against the defendant. In the progress of the trial, a bill of exceptions was sealed at the instance of the plaintiff, which presents the following facts. The plaintiff sent a mare, and some colts, to be wintered by the defendant, and pledged the mare and colts to the defendant to pay for their keeping, and also for another demand, with authority, on a certain contingency, to sell them to pay for their keeping, and the other demand. This other demand, was a note given by defendant to plaintiff, to enable him to raise money on, but which the plaintiff lost at gaming, and plaintiff gave defendant notice not to pay it—the note remaining in the hands of the party winning it, until payment. There was also proof tending to show, that the mare and colts were worth more than the expense of keeping them, and that the defendant advertised them, and had them sold at public auction, the defendant becoming the purchaser at said sale. Under this proof, the court charged the jury, that the defendant was not bound, under the circumstances, to pay the note, and the pledge as to the note

was void ; but that the pledge of the stock for the keeping them through the winter was good.

The plaintiff requested the court to charge the jury, that if they believed, that the defendant sold more of the plaintiff's stock than was necessary to pay for the keeping of them, the plaintiff could recover the value of so many as were not necessary to pay for their keeping.

This charge was refused, and the court charged the jury, that the sale, as shown, did not amount to a sale.

WOODWARD and RICE, for plaintiff.

L. E. PARSONS, contra.

DARGAN, J.—In an action of trover, it is necessary for the plaintiff to show title to the property, an immediate right of possession, and a conversion by the defendant. The plaintiff's title to the property in this case, was not denied by the charge of the judge, but the charge was calculated to induce the belief, either that there was no conversion shown, or that the plaintiff did not have an immediate right to the possession ; hence arises the necessity of examining this question. If one deliver stock, or cattle, to another, to be kept or fed, with the power to sell them to pay for their keep, will trover lie against the party to whom they are so delivered, if he convert the cattle to his own use, without tendering pay for keeping them ?

It is very clear, that if a factor, or other bailee, having a lien on goods, sell them, or convert them to his own use, or destroy the goods, as by drawing out a quantity of wine from a cask, and filling it up with water, that the owner may bring trover immediately, without regard to the lien. See 19 Wend. 431, and the cases there cited. And I think that any act by a lien holder, inconsistent with the character of his possession, and denying the title of the owner, will justify the owner in bringing trover, and that such conduct on the part of the lien holder, destroys his lien. See *Samuel v. Morris*, 6 Car. & Payne, 620.

This view is corroborated by Mr. Chitty, in his work on Pleading, p. 152. It is there said, that if a person have

goods in his possession, on which he has a lien for the payment of a debt, the owner cannot bring trover without tendering the money due on the goods. But if the party being applied to for the goods, refuses to deliver them for a different reason than that he has a lien on them for his debt, and do not mention his lien, he shall not be permitted to set up his lien afterwards, to defeat the owner in an action of trover. See also Bacon's Ab. title Trover. Now the reason of this can only be, that one being applied to for the goods, the lien holder repudiated the title of the owner, denied the character of his possession, and consequently there was a clear conversion of the property. Hence, trover would lie. Had there been no express agreement in this case, that the mare and colts should be pledged to pay for keeping them, with the power to sell, if necessary, to pay for their keep, there would be no difficulty; for the conduct of the defendant was such, as would have justified a jury in coming to the conclusion, that he held the property, not in subordination to the title of the owner, but that he had set up his own title as adverse to that of the owner, and by such conduct, his lien would have been no protection to him against this suit. But here there was an express agreement, that the stock should be liable for keeping them, with the power to sell them to pay the expenses. This is a contract, and is not a new lien, resulting from the rules of law. By the terms of this contract, the defendant had the right to sell so much of the stock as was necessary to pay what might be due to him for keeping them. If one of the horses was enough for this purpose, he should not have sold more—but proceeding to sell all of them, which was not necessary to pay the expense of their keeping, was an assumption of ownership beyond the authority conferred on him by the terms of the contract. The power to sell ceased with the extinguishment of his demand; his debt for keeping the horses being paid, he had no right to sell more, and his doing so was a conversion of that portion of the stock sold by him, which was not necessary to pay the debt due for keeping them. The circuit court therefore erred in refusing to give the charge requested, that the defendant was liable for such of the stock sold, as were not necessary to pay the amount due for keeping them.

The view here taken, is sustained by the case of *Roberts v. Beeson*, 4 Porter's Rep. 164. In that case it was decided, that an action of trespass would lie against a sheriff, who sold more of the defendant's goods than was necessary to pay the execution. So it has been held, that if a sheriff having a *fi. fa.* for forty shillings, sell five yoke of oxen, one yoke being sufficient to satisfy the *fi. fa.*, he may be considered as a trespasser, and sued as such, for the value of the four. See the case referred to in 4 Porter, and 20 Viner's Abr. 458.

The charge of the court as asked, admits the right of the defendant to sell enough to pay his debt, but sought to charge him for the conversion of that portion of the stock, sold after he had raised money enough to extinguish it. The court did not give this charge, because the defendant himself was the purchaser. The sale was at public auction, and the defendant the highest bidder. Such a sale is not absolutely void, but is voidable at the election of the party whose title is sought to be divested by such sale. The court should have given the charge as requested, and for the refusal so to charge, the cause is reversed and remanded.

DUBOSE v. PARKER.

1. P lent D a sum of money, taking his note for the payment; at the same time a parol agreement was entered into by the parties, that the borrower should pay the State tax on the loan, which was one fourth of one per cent. Held, that P was entitled to recover eight per cent. on the loan, and that the contract was not on its face usurious.

Error to the County Court of Monroe.

THE facts sufficiently appear in the opinion of the court.

T. & J. WILLIAMS, for plaintiff in error.

CHILTON, J.—1. The question in this case is, whether a note for the principal amount borrowed, and lawful interest, is rendered usurious by an independent, but contemporaneous parol contract, that the borrower should pay the State tax on the loan, which was one fourth of one per cent. We cannot intend that the legislature, by the enactment of the revenue law, designed to diminish the rate of interest to which the lender was entitled. If we arrive at a different conclusion from the ordinary effect of the law upon the lender, by parity of reasoning the law would be designed to diminish the salaries of officers which are taxed, whose compensation by the constitution “shall not be diminished during their continuance in office.” Besides, such a construction would render the rate of interest different as applied to different contracts; for example, if there be a loan of money, the rate per cent. for one year would be eight per cent., less one fourth of one per cent., whereas if a horse had been sold for that sum, and the note for the price had been due one year, the interest would be eight per cent. We think it clear the legislature intended to make no such distinction.

2. The fact that the agreement to pay the tax by the borrower, was not incorporated in the note, which is for the money loaned and the legal interest, does not, in my judgment, at all affect the question of usury. If the agreement was contemporaneously made to pay the tax, it was a part of the contract, although not evidenced by the writing. *Merrills v. Law*, 9 Cow. Rep. 65; *Scott v. Baber*, last term.

3. Aside from what I conceive to be a just construction of the revenue laws of the State, it seems to me the agreement in this case would not render the contract usurious. “While it is true,” as stated by Lord Mansfield, “that if the transaction is a real loan of money, the wit of man cannot find a shift to take it out of the statute.” *Floyer v. Edwards*, Cowp. Rep. 112. Still, the rule should not be so stringently applied as to embrace cases not coming within

the mischief which it was designed to remedy. The law has deemed it wise and just to permit the lender to realize as profit eight per cent. per annum for the loan of his funds. By the contract in question, he receives no more. The payment of the tax upon the loan, is not very dissimilar from the payment of expenses for conveyances, which are usually borne by the borrower. *Hine v. Handy*, 1 Johns. Ch. Rep. 6. Mr. Comyn states the rule, "when trouble, or expense, or inconvenience is sustained by the party advancing the money, the law allows of a reasonable compensation for this, in addition to the interest becoming due." Comyn on Usury, 160.

In *Ely v. McClung*, 4 Por. Rep. 128, it is held there must exist the intention to commit usury. See also *Knox v. Goodwin*, 25 Wend. Rep. 643; *Planters' Bank v. Snodgrass*, 4 How. (Miss.) Rep. 573. So, where a note being put in suit, was renewed, the debtor paying two and a half per cent. as a fee to the plaintiff's attorney and the cost, held not usurious. *Simmons v. The Union Bank*, 3 S. & M. 781. See also *Coster v. Dilworth*, 8 Cow. Rep. 299. We cannot, in the case before us, see any condition imposed oppressive to the debtor, nor any intention to evade the law against usury. *Lloyd v. Scott*, 4 Peters's Rep. 205.

Let the judgment be affirmed.

ASHURST'S ADM'R v. ASHURST'S HEIRS.

1. An administrator has no power to purchase the widow's dower right in land, with the personal assets. Nor will the fact, that the purchaser of the estate supposed the dower was extinguished, legalize the purchase made by the administrator of the widow's right.
2. Money received by an administrator upon a private sale of the land of his

Ashurst's Adm'r v. Ashurst's Heirs.

intestate, is not assets of the estate, with which he can be charged on his final settlement.

3. The refusal of the orphans' court to allow the administrator $7\frac{1}{2}$ per cent. on his receipts and disbursements, is not erroneous, unless it be shown by clear and convincing proof, that more than the usual compensation should be allowed in that particular case,
4. The supreme court will render the proper decree, when reversing a decree of the orphans' court, where the record furnishes the means of doing it.

Error to the Orphans' Court of Montgomery.

UPON the final settlement, the administrator proved, that he had paid the widow \$3,500 for her dower in the lands of the intestate. That he had sold the lands of the intestate under an order of the orphans' court, and that the purchasers supposed they were purchasing free from the widow's claim of dower, and that it accordingly sold for a larger price. The court refused to allow this item as a charge upon the estate.

It was proved, that in the year 1840, the administrator made a private sale of some of the lands of his intestate, at \$3,500, and received \$1,000 in cash, and the notes of the purchaser for the residue, and executed a bond for title. That afterwards an order was obtained for the sale of the lands, and it was bought by the former purchaser at \$1,750, the previous contract cancelled, and the notes for the purchase money, and title bond, delivered up. Thereupon the court charged the administrator with the said \$1,000, in addition to \$1,750, for which the land was sold at the last sale.

It was proved, that \$19,258 of the amount allowed the administrator, were the proceeds of property of the estate, sold by the sheriff, at different times, by execution against the administrator, that he was present at the sales on the plantation, twenty miles from Montgomery, superintending them, and thereupon the administrator claimed seven and a half per cent on the sales; which the court refused to allow,

and to all which he filed an exceptive allegation, and now assigns for error.

J. W. PRYOR and T. J. JUDGE, for the plaintiff in error.

The administrator ought not to be charged with the \$1,000 received from Thomas B. Taylor. This was received on a private contract for the sale of land belonging to the intestate. At the time of this contract the administrator had no interest in the lands. He was absolutely a stranger to them. When he made the contract he did not profess to be acting as administrator; but if he had professed to act as such, the contract would have been void, as he had no interest in the land which he could convey, &c. If the land had not subsequently been sold under a decree of the orphans' court, and the heirs had refused to affirm the contract with Taylor, then Taylor could have recovered back the \$1,000, in an action for money had, &c., or after paying up the whole amount agreed to be paid, by an action on the bond. The sale under the decree did not change in any respect the relations created by the private contract, between Taylor and the administrator—the two sales were distinct, and wholly independent of each other. The first one was void, and the latter a judicial sale. The administrator is still liable to Taylor for the \$1,000, unless Taylor has discharged him. Whether the contract between Taylor and the administrator was rescinded, or whether the administrator is discharged from liability to Taylor in any way, is immaterial—for such rescission or discharge certainly could not have the effect of *creating* a liability in favor of the defendants in error. See *Myers v. Hodges*, 2 Watts, 381; *McCoy v. Scott*, 2 Rawle, 222; *Seitzinger v. Weaver*, 1 Rawle, 377; *Gibson v. Farley*, 16 Mass. 280; *Perry v. Brown*, 1 Bailey's L. Rep. 45; *Overseers Bridgewater v. Overseers Brookfield*, 3 Cow. 299.

BELSER & HARRIS, and ELMORE, for defendant in error.

1. If an administrator deals out of the duties of his trust, and any loss occurs from it, he must bear the same. He cannot charge the estate with the expense of such a contract. *Foster v. Fuller*, 6 Mass. 58; *Key v. Boyd*, 10 Ala. 154.

2. The administrator should have been charged with the \$1,000, which he received from Taylor, under the private contract. The \$250 paid to Taylor afterwards, when the bond and the notes for \$2,500, were mutually surrendered by the parties, had nothing to do with the \$1,000, but was a new contract, independent of it. Taylor did not claim the \$1,000, and to allow the administrator to retain it, is to permit him to make \$1,000 out of the property of the estate, for himself. The \$1,000 given up by Taylor, became assets of the estate, although raised perhaps by a void sale, and was a proper charge against the administrator. It enured to the benefit of the *cestui que trust*. *Green v. Minter*, 1 John. Ch. 27; 2 A. K. Mar. 389; 4 Paige, 578; 3 Dess. 25; *Holdridge v. Gillespie*, 2 John. Ch. 30; *Murray v. Lilburn*, Ib. 442; *Ray's Ex'rs v. McCulloch*, Cam. & Nor. 402, 497; *Cobb v. Thompson*, 1 A. K. Mar. 513; 10 Peters, 137; 1 Bos. & Pull. 296; *Ringold v. Ringold*, 1 Har. & Gill. 11. The \$1,000 was charged as *special* assets, from the real estate, in the judgment in behalf of the heirs.

3. The administrator received for his compensation \$5000. This was enough; the court exercised a prudent discretion in the premises, and its judgment will not be interfered with, unless manifestly unjust. *O'Neal v. Donnell*, 6 Ala. 734; *Harris v. Martin*, 9 Ib. 895; *Triplett v. Jameson*, 2 Munf. 242; 9 Ser. & Rawle, 204.

COLLIER, C. J.—1. An administrator has no authority to purchase of the widow her interest in the real estate of her husband, his intestate. His ordinary powers make him the representative in all matters in which the personal estate is concerned, of the person of the intestate, and he may disincumber the realty by discharging liens which the deceased has himself created; as the payment of mortgages, &c. But an incumbrance which the law originates upon the death of the intestate, cannot be removed at his mere volition by an application of the personal assets. To this latter category belongs the right of the widow to be endowed of the lands of which her husband was seized during his life. It may be, that a court of chancery may invest an administrator with

such a power, where it shall be made apparent that it will be beneficial to the interests of the estate.

The fact that the purchasers of the realty of the intestate at a sale under a decree of the orphans' court, supposed that they acquired a title free from the widow's claim to dower, cannot legalize a previous purchase of that claim by the administrator. It is not competent for that court, under its restricted powers, to confer such an authority, and being exercised by the administrator, its subsequent sanction could not validate it. Whether, upon proof that the estate was really benefited by the extinguishment of the right of dower, a court of chancery would allow the administrator to retain what he had advanced, is an inquiry which may perhaps, in a proper case, be deserving of consideration. But the orphans' court possesses no such authority.

2. The sale of the land to Taylor by the administrator at private sale, seems to be wholly unconnected with the sale which was subsequently made under the decree of the orphans' court. It is not questioned that the private sale was merely void—being such as an administrator could not make. The payment, then, of a part of the stipulated price, cannot be regarded as so much money in the hands of the administrator, with which he can be charged by the orphans' court in the settlement of his accounts. It may be conceded, as we incline to think that the administrator cannot hold this money for his individual benefit, yet the objection to the jurisdiction of the orphans' court is not removed. That tribunal cannot look beyond his representative character, and hold him accountable as an individual merely, without reference to the trust it conferred upon him. In *Smith's Heirs v. Smith's Adm'rs*, at this term, we say, if an administrator receive money or property belonging to the estate he represents, to which he is not entitled in his representative character, although he cannot hold it against the party legally entitled, yet the orphans' court cannot take it into the account, and render a decree against him therefor on the settlement of the administration. A court of law, proceeding according to the ordinary forms, or a court of chancery may hold him accountable, and render complete justice. Upon

the point we are considering, this case is conclusive of the case at bar ; and it follows that the administrator should not have been charged with the money received of Taylor on the private sale of the land.

3. It cannot be inferred from any thing in the record, that the charge made by the administrator of seven and a half per cent. upon his account for receipts and disbursements should have been allowed, or that the orphans' court did not rightly reduce his claim for compensation. We will not say that there are not cases in which an executor or administrator should not be allowed so much ; but as the demand is beyond the ordinary charge, the proof should be satisfactory and convincing to induce its allowance. As to the rule of compensation, see 2 Kent's Com. 420, note ; 10 Ala. Rep. 900, 966.

It is insisted, that instead of remanding the cause to correct the error we have indicated, a decree should be here rendered, abating from the shares of the distributees, *pro rata*. We see no objection to this course, as it is our duty upon reversing a judgment or decree to make such disposition of the case as the primary court should have done, where the record is in a condition to act understandingly, and without prejudice to the parties' rights. Here, specific sums are directed to be paid to the several distributees, and the cause may therefore be definitively disposed of. The decree is reversed, and here rendered abating from the share of each distributee who received the benefit of it, *pro rata*, the amount for which the administrator was charged by the orphans' court, as money received by Taylor on his purchase at private sale, of a part of the lands of the intestate's estate.

EVANS, ET AL. V. THE STATE BANK.

1. If the defendant in a summary proceeding, appears and makes no objection to the court then proceeding to entertain the motion, he cannot object on error, that the notice was for a judgment at the preceding term of the court, and that no action, by continuance or otherwise, was then had upon it.
2. An admission by the sheriff, after the expiration of his term of office, that he had collected the money upon an execution, is not evidence of the fact against his sureties.
3. It is not necessary that the plaintiff should proceed at the next term after demand made of the sheriff, to entitle him to recover of the sureties, five per cent. per month from the time of the demand.

Error to the County Court of Tuscaloosa.

MOTION by the bank, against the plaintiffs in error, sureties of Daniel Chandler, sheriff of Perry county, for the amount of an execution collected by him, and five per cent. per month, from the time of making demand of payment. The notice was, that a motion for judgment would be made at the December term, 1846, of the county court of Tuscaloosa. It does not appear from the record that any action was had upon the motion at that term, but at the May term, 1847, a judgment was rendered in favor of the bank, the defendant appearing by his attorney, and it does not appear that any objection was made by the defendant, to the entertainment of the motion, at that term, by the defendant.

From a bill of exceptions, it appears, that several different executions came to the hands of the sheriff, the last of the series being levied, the 23d June, 1842, and a forthcoming bond taken and forfeited, and that the execution which issued on the forthcoming bond, was never returned by the sheriff. The only proof that the sheriff had made the money was his admission to that effect, made to an agent of the bank, who demanded the money on the 31st July, 1835.

Upon this testimony, the court rendered judgment against

the defendants, for the amount of the execution, and five per cent. per month, from the time the demand was made. The defendant now prosecutes this writ, and assigns for error—

1. The court erred in rendering judgment against the plaintiff in error, on the facts stated in the judgment entry.
2. The judgment is for too much.
3. The court erred in ruling against Evans.
4. The court erred in rendering judgment in favor of the bank, on the evidence set forth in the bill of exceptions.

PECK, for the plaintiff in error.

1. No judgment could be rendered on this notice; it was returnable to December term, and the record does not show that any action was had on it until the May term.
2. This proceeding ought to have been commenced to the first term of the court, after the demand was made.
3. There was no evidence that any execution ever issued on the forthcoming bond, or that it was received by the sheriff.

P. MARTIN, contra, insisted, that the evidence was sufficient to authorize the court to render the judgment.

That the defendants appearing by attorney, as shown in the record, cures the defect of the neglect to show on the record, that the motion was continued at the December term, 1846, and that this objection is waived.

DARGAN, J.—The first question presented by the plaintiff in error is, that no action being had on the notice, which was returnable to the December term, until May, therefore the notice was *functus officio*, and it was erroneous to render judgment thereon.

When a party gives notice, that he will move the court in a summary proceeding for judgment, at a particular term, some action must be had on the notice at the time specified in it, or the law will presume that he has abandoned his intention of proceeding on it, and he cannot afterwards move the court for judgment on such motion, and take judgment by default.

But if the cause was continued by the court, to the next

term, or to a day certain, then the plaintiff may proceed on such notice, for the law presumes the defendant to be apprised of the act of the court in continuing it. There is no entry of continuance as shown in the record, and of course no judgment by default could be sustained. But the defendants appeared by attorney, when the motion was made, and offered no objection to the action of the court on this notice. What is to be inferred from this? Either that the cause was continued to the May term, by the court, of which they were apprized, or that it was continued by agreement between the plaintiff and the defendants; for at the May term the bank moves for judgment, and the defendants, then in court by attorney, appear, and interpose no objection in the court below, to the action about to be had on the notice—they cannot be heard here to say, we have been injured, or surprised, by the motion of the plaintiff on this notice, at the May term, for at the May term they appeared to the motion.

The second question tests the sufficiency of the proof, to warrant the rendition of the judgment. The only evidence to show that the sheriff, David Chandler, ever collected the money on the execution described in the notice, is, the admission of Chandler, made to Hawn, the cashier, on the 31st July, 1845, that he had collected the money, and begged indulgence for a short time, stating he would come to Tuscaloosa and pay it. This evidence presents the question, how far the securities of a sheriff are bound by his admissions—that as sheriff he had collected money, for which they, as his securities, are bound to account. It may be laid down as settled law, that the admissions of a sheriff, made at the time of doing an official act, in relation to the receipt of the money on a *fi. fa.*, are to be considered as part of the *res gestae*, and are admissible as evidence to charge the securities. See 7 Ala. Rep. 835, *Bondurant v. The State Bank*, 9 Ala. 484; Greenl. Ev. 219, and the cases there cited. But these authorities hold, that admissions made by a sheriff, not at the time he is doing any official act, in relation to the receipt of the money, are to be considered as declarations independent of any official act, and not admissible to

charge his securities. Testing the record by these authorities there is error; for the only evidence to show the collection of the money by Chandler, on the *fi. fa.* is the admission by Chandler, made on the 31st July, 1845, that he had collected it.

He could not at that time have been sheriff. We see from his return on the bond, the 4th July, 1842, that he could not have been sheriff on the 31st July, 1845, for he could hold his office but three years, and is then disqualified for the three next succeeding years—and admissions made after his term of office is expired, and when, of course, he could not be engaged in doing any official act, in reference to the receipt of the money, are not evidence against his securities.

This is the only error we can see in the record. It is true that the statute under which the plaintiff is proceeding, is highly penal; it gives to the plaintiff five per cent. per month on the amount of the money collected, from the time the demand is made. The plaintiff is not compelled by this statute to proceed against the securities at the next term of the court after the demand is made, and of course if not compelled by the act, he may proceed at any time, until barred by the statute of limitations.

But for the error we have pointed out, the judgment is reversed, and the cause remanded.

WHITLOCK v. STEWART.

1. H having received from S, property in pledge for his indemnity, lent his note to S for the purpose of raising money upon it. S lost the note at gaming, and the winner lost it in the same way. The third holder took it to H, who being ignorant of the facts, executed to him a new note, in lieu of

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the old one payable to him. After this, S notified H of the facts, and forbade the payment of the note. Held, that a payment by H, after notice, created no charge upon the property placed in his hands for his indemnity.

Error to the Circuit Court of Cherokee. Before the Hon. G. W. Lane.

PLAINTIFF in error declared in trespass for malicious arrest and false imprisonment. Plea, not guilty. It appears, by bill of exceptions, that on the trial, the plaintiff having proved the arrest, the defendant proved that plaintiff applied to one Heard to borrow money. Heard not having the money, made his note, and loaned it to plaintiff to negotiate and raise the desired sum. Upon receiving the note, the plaintiff having some live stock (a mare and colt) in Heard's possession, agreed with Heard that he should retain it for his indemnity for the re-payment of the note. Plaintiff shortly afterwards lost the note by gaming, and which was shortly afterwards lost by the winner in the same way; the third holder, who had won it, took it to Heard, who, before notice of the manner in which plaintiff had parted with it, took it up, and executed a new note to the holder. Before payment of the last named note, plaintiff notified Heard of these facts, and forbade his paying the note. That the plaintiff took the stock into his possession in the night time, removed it to a different part of Benton county, some twenty-five miles distant from Heard's. Afterwards, Heard reclaimed the property, and when on his way home, defendant showed that plaintiff followed him several miles to a public gathering, at which place Heard sued out a warrant against him for horse stealing, (no warrant being shown, or its absence accounted for,) and a day was set for the preliminary trial before the justice. Plaintiff failed to appear at the trial, and was not seen in the neighborhood of Heard for some two or three weeks thereafter. Shortly after his return, he threatened to take the stock from Heard's possession, or die in the attempt. Heard, hearing of this threat, proceeded to the place where plaintiff resided, and imprisoned him. The plaintiff moved

the court, after defendant had closed his proof, to exclude from the jury the proof offered by defendant of the taking of the stock; also, of the warrant and the arrest under it, and of plaintiff's failure to attend the trial. The court refused, and plaintiff excepted. The circuit judge was asked, at the instance of the plaintiff, to charge the jury, that if they believed the note made by Heard to the plaintiff had been lost by plaintiff at gaming, and won by the holder of the new note, from the person who won it from plaintiff, knowing that plaintiff had so lost it, and that plaintiff had notified Heard thereof, and forbade his paying the new note, before he had paid any part thereof, then, the new note could not be enforced against Heard, and that he had no right to detain the plaintiff's stock, and plaintiff had the right to take it. The court refused this charge, and charged the jury, that Heard was bound for the payment of the new note, and had a right to subject said stock to its payment, if, while Heard had possession of it, plaintiff had given him a verbal lien on it for the payment of the original note. The court also charged, that if the jury believed the plaintiff had stolen the stock from Heard, and was arrested for it, and afterwards refused, or failed to attend the trial before the justice, he was a *felon at large*, and the defendant had a right to arrest him without warrant. Also, that if plaintiff intended to commit a felony, the defendant had no right to arrest him without warrant, but if the arrest was made to prevent its commission, this should go in mitigation, not in justification of the arrest.

S. F. RICE, for the plaintiff in error.

L. E. PARSONS, contra.

CHILTON, J.—We think the charge given by the court as respects the liability of Heard on the note, manifestly erroneous.

The contract by which the plaintiff parted with the note, as well as the contract by which the holder acquired it, being void by the statute, (Clay's Dig. 257, § 1; Ib. 434, § 17,) Heard, who had received notice of these facts, was under no obligation to pay the new note, and, if after notice, he had

made voluntary payments upon the note, such payments would have created no charge upon the property pledged for his indemnity. If the defendant in error (Heard) was under no obligation to extinguish the original note, the note subsequently given is wholly without consideration, and cannot be recovered. Yet, having been induced by the laches of plaintiff to give the note, he should be bound to indemnify him against the expense of defending against it. So, while we regard the charge given as erroneous, we think the charge asked was also liable to objection, as it assumes that the plaintiff is not entitled to *any* indemnity.

As to the other charges given by the court, if the bill of exceptions contains all the proof, they were clearly erroneous, as in that event they would be abstract; but we are not allowed to say that there might not be a conceivable state of case which would justify them, and as there may have been proof not set out in the record, which does not purport to contain the whole proofs, it is unnecessary to give an opinion upon them as abstract propositions of law.

For the error we have noticed in the charge given, the judgment is reversed, and the cause remanded.

WELLS AND WELLS v. THOMPSON.

1. The failure of an Indian reservee, or his or her heirs, under the provisions of the treaty of the 24th March, 1832, with the Creek tribe of Indians, to take possession of the land allotted to them, or in any manner to signify a desire to remain in this state, after the five years expired, determined the estate to which they would otherwise have been entitled, and the land re-vested in the United States, without an entry, or other act on the part of its agents.
2. A marriage between a white man and a woman, who is of mixed white

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and Indian blood, if made between parties able and willing to contract, and consummated, is valid under the law of this state. *Quere*—When a marriage is duly solemnized in this state, does not the strength and perpetuity of the marriage tie depend upon the marriage *domicil*, and not upon any subsequent residence of the parties in a heathen country?

3. A marriage solemnized in this state, is not dissolved by an abandonment of one of the parties, unless sanctioned by a divorce in due form.
4. The husband is a tenant by the curtesy, of waste and uncultivated lands, not held adversely by another, of which the wife had only the legal seizin, if the other incidents necessary to create the tenancy by curtesy exist.
5. The adultery of the husband is not a forfeiture of the tenancy.
6. Though the husband may forfeit his estate, as tenant by the curtesy, by a wrongful alienation, tending to the disherison of the reversioner, or remainder man, the sale of his interest as tenant, has no such effect.

Error to the Circuit Court of Macon. Judgment by his Honor George W. Stone.

TRESPASS to try title, by the plaintiffs in error. From a bill of exceptions it appears, that one Mary Wells, under the 2d article of the Creek treaty of the 24th March, 1832, was enrolled as the head of a family, and located on the land in controversy, and that the defendant was in possession at the commencement of this suit. The plaintiffs are the children of Mary Wells, who was not more than one-fourth of Indian blood.

That in 1821, she was married to one William J. Wells, a white man, by an authorized officer in Monroe county, in this State, according to the laws of this State, and whilst residing among the whites, and out of the limits of the Creek tribe. That shortly after the marriage, they removed within the limits of the Creek tribe, and remained domicilled with the tribe until the year 1828, when they with their children, the plaintiffs, went to the ten Islands, where Wells took up with another woman, and the said Mary repaired with her children, the plaintiffs, to her father's residence in the Creek territory. After this, and before the treaty of 1832, Wells visited the residence of the father of the said Mary, and took and carried the plaintiffs, who were at that time minors, to the

State of Arkansas, and neither he or the children returned to her during her life.

It was proved, that by the laws and customs of the Creek tribe, a man was allowed to take a wife, and abandon her at pleasure, and that this worked an absolute dissolution of the marriage state, and the parties were not allowed to marry again, until after the succeeding annual green corn dance. That the husband took no part of the personal effects of the wife by the marriage, and at her death her personal estate descended to her children, or next of kin. In regard to real estate, it was in proof, that each town had its regular possession under a separate control, worked in common, each occupying a suitable spot within the enclosure, the unappropriated soil being free to all. There was no such thing known among them as title to lands. That if a house was erected by the husband it belonged to him; if by the wife to her.

The defendant then proved, that about the year 1836, he purchased the land in controversy from Wells, for \$1,800, and introduced and read a patent from the United States, to the defendant, for the land in controversy, issued on the 1st June, 1843, which recites that Mary Wells, wife of William J. Wells, by virtue of the treaty of 1832, became entitled to a tract of land, which is described; that Wells had sold the same to the defendant, with the approbation of the President of the United States, &c. &c. There was no proof that either Mary J., or William J. Wells, were ever in the actual occupation of the lands.

The defendant moved to exclude the patent from the jury, which the court refused, and he excepted.

The court charged, that if William J. and Mary Wells, were married in 1821, according to the law of Alabama, if he was living at the time of the treaty, and continued in life until 1836, his abandonment of his wife in 1828, did not work a dissolution of the marriage contract, though such might be the custom of the Indian tribe. That in that state of case, Mary Wells was not the head of a Creek Indian family, and should not have been located. That the defendant was estopped from denying that Mary Wells was located, but

it was competent for him to show that her husband, William J. Wells was the head of the family, and of right entitled to the location. That it was competent for the government to correct its own errors, and the patent, if the facts are believed, might be regarded as such correction by the government, by the act of its agent; and if said Wells, being the surviving husband of Mary, sold to the defendant, and pursuant to that sale the patent issued, they must find for the defendant.

The court refused to charge, that a change of the residence of Wells and his wife, to the Indian nation, his abandonment of her, and removal to Arkansas—the continued residence of Mary afterwards, she being of Indian extraction, in the Indian nation, was under the proof a dissolution of the marriage.

The court also refused to charge, that the act of the officer of the United States, appointed to take the census of the heads of Creek Indian families, determining Mary Wells to be the head of a family, and placing her name on the census roll, was conclusive on the government, and all persons claiming under it. The plaintiff excepted to the action of the court as stated in the bill of exceptions, and now assign it as error.

S. F. RICE, for plaintiffs in error.

1. A patent issued in violation of law, or obtained by fraud, is void. And the head of a Creek Indian family enrolled and located under the treaty of 1832, may show such enrollment and location to defeat a patent subsequently issued. *Ladiga v. Rowland*, 2 How. U. S. Rep. 581.

2. The Creek treaty of 1832, is itself the title of the head of a Creek family, to the half section of land on which such head of a family is located by the officer of the government; and this title is paramount to that conferred by a patent subsequently issued.

3. The location of the head of a Creek family upon a half section of land, by the officer of the government, under the Creek treaty of 1832, is conclusive upon the government, and all persons claiming under the government by purchase subsequent to the location. *Crommelin v. Minter*, 9 Ala. R.

594; 8 Smedes & Mar. R. 234; Hit-tuk-ho-mi v. Watts, 7 Ib. 363; Smede's Dig. 179, § 12.

4. The recitals in a patent are conclusive upon the party claiming under it. And as the patent to the defendant in this case distinctly admits, that the mother of the plaintiffs was entitled to the land by the treaty of 1832, that admission estops the patentee (as well as the government) from denying the plaintiff's title—when it is shown that the plaintiffs are the heirs at law of Mary Wells. (The laws of Alabama were extended over the Creek territory on the 16th day of January, 1832, and long before the death of plaintiff's mother; and therefore her children are by that law entitled to her rights in the land.) Brasher v. Williams, 10 Ala. Rep. 630. See the act of 16th January, 1832, entitled "an act to extend the jurisdiction of the State of Alabama," &c. &c.

5. Marriage in Alabama has ever been dissoluble. A marriage between a white man and a Creek Indian woman, in a county (Monroe) subject to the jurisdiction of the laws of Alabama, may be dissolved according to the laws and customs of the Creek tribe, if the parties acquired an actual *bona fide* domicil in the Creek nation before the dissolution, and before the laws of Alabama were extended over the Creek Indian territory. Story's Conf. of L. § 230, a, 2d ed.; Dorsey v. Dorsey, 1 Chand. L. Rep. 287, 289; Wall v. Williamson, 8 Ala. Rep. 48; Wall v. Williams, 11 Ib. 826.

6. "While the parties remain subject to our jurisdiction, the marriage is dissoluble *only by our law*; when they are remitted to another, it is incidentally remitted along with them." Story's Conf. of L., *supra*; Wall v. Williamson, 8 Ala. Rep. 48.

7. The dissolution of the marriage between Mary Wells, and her husband, occurred many years before 1832, when the laws of Alabama were extended for the first time over the Creek territory. The Indian law was the only law of force in that territory, when the dissolution of the marriage occurred. And it would be a most harsh and unjustifiable mode of construing the treaty of 1832, to say that Mary Wells was entitled to nothing under it, although by the Creek Indian law, she was completely divorced from her

husband. In the construction of this treaty, and in all acts done under it, the customs and laws of the Creek tribe have been carefully observed and regarded. The very terms used in the treaty, "every head of a Creek Indian family," necessarily imply that regard was to be paid to the Indian laws in determining their family relations. *Wall v. Williams*, 11 Ala. R. 826.

8. The patent being void, is void for all purposes; and could not be good to transfer to defendant the curtesy of the husband, even if he had been tenant by the curtesy. But it is manifest that he was not tenant by the curtesy, for many reasons—one of which is, that he was divorced from his wife long before the Creek treaty of 1832, and before either had any interest in the land. And "the effect of this dissolution of the marriage, according to the Indian laws, is the same in the courts of Alabama, as if directed by a lawful decree." *Wall v. Williamson*, 8 Ala. R. 48; *Wall v. Williams*, 11 Ala. R. 826.

9. The title of the plaintiffs is clearly made out to the land. And every point ruled against them on the trial, was a violation of the law of the country. See the cases above cited.

McLESTER and BELSER, for defendant in error.

1. The marriage between Wells and his wife in 1821, was properly proved. The marriage itself was neither polygamous or incestuous, and such a contract, in a civilized country, exists throughout time, unless it be annulled by death or by some legal decree. See *Corn v. Norcross*, 9 Mass. 492; *Fenton v. Reed*, 4 Johns. 53; 16 Mass. 157; *Milford v. Worcester*, 7 Mass. 52; *Car. Law Jour.* 94, 377.

2. The marriage having taken place among the whites, and in accordance with their law, Wells became and continued, the head of the family. The case is different from that of a union between two persons of the Indian tribe, entered into according to the usage of the tribe, and at a time and place, when and where, their laws were in force. See *Sto. Confl. Laws*, 122; *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Ala. 826.

3. The plaintiffs are concluded by the action of the govern-

ment. The patent has issued—the matter has been settled by a competent tribunal. The record shows no such case as that of Sally Ladiga, settled by the supreme court of the United States. It comes within the principle of some of the decisions of this court. See Sally Ladiga's Case, 2 Howard, 581; Parsons's Heirs v. Inge's Heirs, 5 Porter, 327.

4. The bill of exceptions does not show to whom the real estate of an Indian descends, according to the custom of the Creek tribe. In the absence of such proof, our law must govern. If our law governs, then, there is no evidence of the death of Wells, before the commencement of the suit. If Wells is alive, (and this is the presumption, until the contrary is made to appear,) even if his wife was the owner of the land, still his transferee can hold it during the life of Wells; therefore, plaintiff's suit must abate. See McLain v. Gregg, 2 A. K. Marsh. 454; Conly v. Porter, 12 Ohio, 79; Davis v. Mason, 1 Peters, 503; Jackson v. Lellech, 8 Johns. 202; Clute v. Miller, 2 Cowen, 439.

5. There is nothing in the record, going to prove that Mrs. Wells was the head of a family, *independent* of her husband, at the date of the treaty of 1832, or when she was located on the land. If the location was unauthorized, her heirs have no right to complain.

COLLIER, C. J.—By the treaty of the 24th of March, 1832, the Creek tribe of Indians ceded to the United States all their land east of the Mississippi river. The United States engaged by the same instrument to survey this land as soon as the same could be conveniently done, and when surveyed to allow ninety principal chiefs of the tribe to select one section each, and every head of a Creek family to select one half section each, “which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in a body in a proper form.” It

is provided by the third article of the treaty, that "these tracts may be conveyed by the persons selecting the same, to any persons for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall not be valid till the President approves the same. A title shall be given by the United States on the completion of the payment." The fourth article declares, that "at the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple from the United States."

Without stopping to inquire what the law may be, upon the point, it may be conceded that the enrolment of the name of Mary Wells as the head of a Creek family, and the allotment to her as such, of the land in controversy, gave her *prima facie* a legal estate, on which she might maintain an action for the recovery of the possession against an intruder. It may also be conceded that if she died before the expiration of five years, without conveying the same as provided by the third article, that her interest did not revert to the United States, but descended to her heirs to be disposed of by them, if adults, or to hold under the provisions of the fourth article. But in the case before us, it does not appear the reservee was in possession, or asserted her right to the land by conveying it, or otherwise; and although she died within the five years, her heirs did not within that time set up their claim to it. In fact, previous to the treaty, they removed with their father to Arkansas, and did not again return to Alabama until after the death of their mother.

The title acquired by the "head of a Creek family" under the treaty, was to continue for five years, unless it was sooner conveyed with the approval of the President; but if there was no such conveyance, it reverted to the United States, unless the reservee or his heirs were desirous of remaining in the country after the expiration of that period. True, this is not explicitly declared, yet it follows from the terms employed in the fourth article, in which the United States stipulate to issue patents to all the reservees who are "desirous of remaining" "at the end of five years." All the title of the Indian tribe passed from it, and the federal gov-

ernment became the proprietor of the fee in the territory they had previously occupied. The government engaged, among other things, to allot half sections of land to each head of a family, to be enjoyed for five years absolutely, and in fee upon certain conditions. Here was the grant of a fee simple estate, defeasible on the happening, or rather the not happening of the event specified. If the condition was not performed as provided, the title of the reservee determined, and the land re-vested in the United States without an entry, or other act on the part of its agents. See *University of Ala. v. Winston*, 5 Stewt. & P. Rep. 17; *Gill v. Taylor*, 3 Port. Rep. 182; *Kennedy & Moreland v. McCartney's Heirs*, 4 Port. Rep. 141; *Crommelin v. Minter, et al.* 9 Ala. R. 594, 600. If this view be correct, it follows that the failure of the reservee or her heirs to take possession of the land allotted to her, or in any manner signify a desire to remain in this State after the five years expired, determined the estate to which they would have been otherwise entitled.

This interpretation of the treaty is enforced by an act of Congress of the 3d of March, 1837, which authorizes the President to cause all reserves belonging to the Creek Indians by virtue of the treaty, and remaining unsold on the fourth of April thereafter, (precisely five years after the treaty became operative,) to be sold at public auction, &c. The second section of the act authorizes the President to confirm the sales made by the widow, the widow and children, the children, or the lawful administrator of Creek Indians who had died or might die prior to the fourth of April, without having legally disposed of their reserves, and to receive the unpaid purchase money, &c. By the third section, the President is invested with a discretion in the investment and paying over to the persons entitled, the money received from the purchasers of reserves. 5 U. S. Stat. by Peters, 186. The terms of this enactment go quite beyond what the terms of the treaty justify, and profess to direct the sale of all reserves, and of course those where the reservee is "desirous of remaining." But in respect to reserves, the allottees of which do not come within the latter category, and have not conveyed their interests, the act is potent to show that Congress

supposed they reverted to the United States immediately upon the expiration of the period prescribed by the treaty. The statute could not have been enacted upon any other hypothesis. This is indicated by the provision for confirming irregular sales, and the discretion conferred in respect to the purchase money to be received under the direction of the President, as well as the power assumed by the first section of the act.

There is perhaps another objection to the plaintiff's title equally fatal to their right to recover in the present action, as that we have considered. Mrs. Wells was of Indian extraction, but not more than one fourth Indian blood, and married Wm. J. Wells, according to the laws of Alabama, in Monroe county, in 1821, where they both resided. Shortly after their marriage, they removed into the country occupied by the Creek tribe, where they resided until 1828, when they again moved to the "Ten Islands" with their children (the plaintiffs.) At this latter place the husband formed an adulterous connection with another woman, and Mrs. Wells left him with her children, and went to her father's house in the Creek territory, whither he had removed after her marriage in 1821. There is no law of this State, which inhibits the marriage of a white man with a woman whose blood partakes of the white and Indian races; and if such a marriage is consummated between persons able and willing to contract, the parties become subject to all the disabilities, and are entitled to all the rights and privileges incident to such a relation. See *Frank and Lucy v. Denham's Adm'r*, 5 Litt. Rep. 530.

Monroe county was the domicil of both the parties at the time they were married, and it cannot be inferred that they then contemplated a residence without the jurisdiction of Alabama. Their subsequent removal to the Creek territory did not *ipso facto* dissolve their connection. Even conceding that they became affiliated with the tribe, did the customs of the nation in respect to marriage, so revolting to Christianity, furnish rules by which the obligations and duties of that state—its permanency and incidents, when solemnized in a civilized country, should be ascertained and determined? We should long hesitate before we would give to this question an affirmative response. It involves other considera-

tions than those which have arisen upon the discussions whether the strength and perpetuity of the *vinculum fidei* depends upon the domicile of the marriage, or the subsequent residence of the parties. See Story's Conf. of Laws, 188 to 192, and citation in the notes; 2 Clarke & F. Rep. 488. But however this question may be settled when it shall come up in judgment, is perhaps not now a material inquiry; for it does not appear that Mrs. Wells separated from her husband until they had fixed their residence at the Ten Islands. The bill of exceptions does not inform where these islands were located, but we must judicially know their position, and that they are in a river, which in 1828 formed a dividing line between the Creek tribe and the settled portion of Alabama; and from the manner in which the facts are stated, the fair inference is, that Mrs. Wells and her husband settled west of the line. Mrs. Wells then abandoned her husband within the jurisdictional limits of this State, and by such an abandonment unsanctioned by a divorce in due form, their marriage could not be dissolved.

The marriage, then, of W. J. Wells with the plaintiffs' mother, and the birth of issue capable of inheriting, being proved, the husband became tenant by the curtesy *initiate* of the inheritable estate of his wife in lands, and by the death of the wife this tenancy became *consummate*. By the common law as administered in England, it was essential to an estate by the curtesy that the wife should have had an actual seizin or possession of the land, and not a bare right to possess, which is a seizin *in law*. 1 Step. Com. 246, *et seq.* But this rule has been relaxed in this country; and if the wife be the owner of waste, uncultivated lands, not held adversely, she is deemed seized in fact, so as to entitle her husband to his right of curtesy. The title to such property draws to it the possession; and that constructive possession continues in judgment of law, until an adverse possession be clearly made out. 4 Kent's Com. 29, *et seq.* It is said that curtesy applies as well to qualified or conditional, as to absolute estates in fee. Id. 32; 8 Johns. Rep. 262; 1 Pet. Rep. 506; 5 Cow. Rep. 574.

The bill of exceptions does not inform us whether the land in question was occupied during the lifetime of Mrs

Wells under an adverse claim, and it may be inferred that it was not, as the husband sold it several years after her death to the defendant and others. The reservee, then, had such a constructive possession as would invest her husband with an estate by the curtesy, if the interest which the United States gave her still continues; and during his life the right of entry and possession cannot vest in the plaintiffs as the heirs of their mother.

Although the statute of Westminster the 2d declares, that the wife's dower shall be lost by her adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy. And it has been said that the forfeiture of the wife's estate by her act will not defeat the curtesy. 4 Kent's Com. 34.

The husband, as well as any other tenant for life, may forfeit his curtesy by a wrongful alienation, or by making a feoffment, or levying a fine importing a grant in fee, suffering a common recovery, joining the *mise* in a writ of right, or by any other act tending to the disherison of the reversioner or remainder-man. 4 Kent's Com. 34. This is the rule of the English common law, and it seems has been recognized in Maine. 21 Maine Rep. 372. But in McKee v. Pfout, 3 Dall. Rep. 486, it was held, that a conveyance in fee by a tenant by the curtesy, though by indenture duly recorded, and with a covenant of special warranty, is not a forfeiture of the estate.

In the case at bar, there is nothing in the record to indicate that W. J. Wells attempted to convey to his vendees a greater interest than his estate by the curtesy. The recital in the patent is, that the land had "been duly sold and conveyed by William J. Wells, to Julian S. Devereux, Moses Thompson, and Weldridge C. Thompson, as appears by the conveyance thereof, dated the 3d day of March, 1836, approved by the President of the United States the 18th day of September, 1841, and deposited in the general land office of the United States." The inference from this is, that the vendor transferred his estate in the land to the vendees according to law; and this conclusion is strengthened by the fact, that the usual form of conveyances by reservees under the treaty, was nothing more, in legal effect, than a relinquishment

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of their title to the purchaser named in the contract. So that, conceding the strict rule of the common law to be applicable in this state, it is not shown that the husband's curtesy has been forfeited by a conveyance of the fee.

We do not intend to be understood as asserting that the estate of W. J. Wells, as a tenant by the curtesy, or otherwise, continued beyond the 4th of April, 1837. But if the interest of Mrs. Wells, as derived from the treaty, and her subsequent recognition as the head of a "Creek family," survived that period, it will not descend to the plaintiffs during the life of their father, but vests in the latter, or his assignees, to be enjoyed until his death.

It is not material to consider other questions discussed as to the effect of the evidence of title set up by either party. The plaintiffs, we have seen, have failed to show such a right as will sustain their action; and as they must recover upon the strength of their own claim, and not upon the weakness of that of their adversary, we will not stop to examine the pretensions of the defendant. We have but to add, that the judgment of the circuit court is affirmed.

CHILTON, J., not sitting.

THE STATE EX REL. SPENCE v. THE JUDGE OF THE NINTH JUDICIAL CIRCUIT.

1. In the case of a contested election, the circuit judge, under the act of 1840, acts as the returning officer, although he is clothed with power to re-examine and recount the votes, and to reject such as are illegal, and a *mandamus* will lie to compel him to give a certificate of election to the party legally elected, when it is withheld by the judge from him.
2. The word "Pence," was written on a ticket, cast at an election for sheriff at which *Spence* was a candidate. On counting out the votes, the

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managers called in the voter, who declared that he did not intend to vote in the sheriff's election, and therefore wrote the word "Pence" on his ticket. Held, that it was properly rejected by the managers.

3. When a vote is improperly rejected by the managers of an election, upon a contest before the circuit judge, he has not the power to consider the vote as cast for the candidate, whom the voter declares he intended to vote for. But if the improper refusal to permit the vote to be cast changed the result, the election should be declared void.
4. One who considers Talladega county as his place of residence, and remains in Wetumpka during the winter, or business season, and declares that he never intended to abandon his residence in Talladega, is qualified to vote in that county.
5. When by birth, or residence, one has acquired a fixed domicil, a temporary absence, on business or pleasure, with the intention of returning, and an actual return, in accordance with such intention, will not work a change of the domicil.
6. The ballots, or votes themselves, are higher evidence of the number of votes cast, than the certified lists of the votes sent by the managers at each precinct, to the managers at the court house, and if either party received more votes than were counted for him, the circuit judge should correct the mistake, and count the votes.
7. If the managers at an election are legally appointed, and duly qualified to act, the right of one elected cannot be impaired by the neglect or omission of the managers, in preserving the votes after the election is over, in the manner prescribed by the statute. The statute prescribing the mode in which the ballots shall be preserved after the election is directory merely.
8. When the ballot box of a precinct is found to contain six more votes than were returned by the managers, for one of the candidates; when two of the managers swear that they believe he received more votes than were counted for him, and certified to the managers at the court house, and there is no proof that the additional votes were fraudulently inserted in the ballot box, after the election, the circuit judge should allow them.
9. A mandamus will not lie when the party applying for it has no specific right, either legal or equitable. It will not lie to require a judge of the circuit court to declare an election void.

Before the Hon G. W. Stone.

SOLOMON SPENCE at a previous day of this term, filed his petition, in which he represented, that at the last August election, he was duly elected sheriff of Talladega county, receiving 711 votes, Josiah Terry receiving 709 votes, and Givens 343 votes. That after the returns of the election were made, and the result was announced, Josiah Terry no-

The State ex rel. Spence v. The Judge of 9th Judicial Circuit. The petitioner, that he intended to contest the election, before the Hon George W. Stone, judge of the 9th judicial circuit, upon the grounds—1. That he, Terry, had received a plurality of the legal votes cast at the election. 2. That mistakes had occurred in counting the votes, prejudicial to the said Terry. On the 10th of November, 1847, the circuit judge proceeded to examine and recount the ballots cast at the election, and to reject those he deemed illegal. That the circuit judge, on such examination and recount of the votes, admitted and counted the votes given at several precincts, which the petition avers were illegal, to wit: the votes polled at Hendricks's precinct; the votes polled at Rhinehart's precinct, and at Mardisville. That those votes were illegal—1. Because the numbers on the ballots were compared with the numbers on the list of votes, by the managers at the election, and by certain persons after the election. 2. Because the oath prescribed by law was not administered to the managers of the election, nor to the returning officer. 3. That the ballot boxes were not preserved, and returned to the judge, in the manner prescribed by law. 4. Because the ballots given at Rivers' precinct were opened and examined after the election was closed.

The petition further alledges, that upon the re-count of the votes, the circuit judge rejected as illegal the votes of James Hanson, Job S. Waites, Jesse Blassingame, and William Mason, who voted for the petitioner; and also refused to count the vote of Richard Smoot, who had offered to vote for the petitioner, but was rejected by the managers. That the circuit judge counted for Terry, the votes of James T. Hurst, Robert Houston, and John Johnson, which the petitioner alledges were illegal; but that the votes of Norton, Shelly, McCattery, Harrall, and William Easley, were rejected by the judge as illegal, and which had been cast for Terry.

The petition further alledges, that the circuit judge declared the result of the election to be, that Josiah Terry was elected by two votes, and gave to Terry a certificate of election, and refused to give a certificate of election to the petitioner.

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The petition concludes with a prayer, that a mandamus be awarded to the said circuit judge, requiring him to issue certificate of election to the office of sheriff of Talladega county to the petitioner, and also for general relief.

Upon this petition, a rule *nisi* was made on the circuit judge, requiring him to show cause why a mandamus should not be issued; to which rule the circuit judge returned—that Terry, the contestant, sought by a re-count of the ballots, and by rejecting certain votes, he alledged to be illegal to be declared sheriff. That Spence, who had been declared sheriff, resisted the re-count, because the first was correct, and that the ballots had been kept so carelessly since the election, that no reliance could be placed on their accuracy; and because the election had been held in such an illegal manner, that it was void. That the returns of the managers shows, that Spence received 711 votes.
That Terry received 709

Making Spence's majority 2

Upon a recount of the votes, he found that Terry had received six votes at Hendricks's precinct that had not been counted for him—thus giving Terry a majority of four votes, as shown by the tickets returned from that precinct. He rejected the votes of James Hanson, Jesse Blassingame, and John S. Waits, and also a vote that had written upon it *Pence*, which had not been counted by the managers. He rejected as illegal, the votes G. G. Norton, Geo. N. Shelly, John McCattery, John B. Harrell, and Wm. Easley, the sheriff of the county, who had voted for Terry.

The six votes given at Hendricks's and not counted, gave Terry a majority of four—three votes given for Spence, and which had been counted by the managers, but by him rejected, swelled Terry's majority to seven—and deducting five votes given to Terry, and by him rejected, reduced the majority of Terry to two—and therefore he gave said Terry a certificate of election.

The return then sets out the names of all the persons whose votes were contested, and refers to the evidence on which they were admitted or rejected.

After this return was made, the judge made an additional

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return, that he procured the lists sent by the managers from Hendricks' precinct, to the managers at the court house, and compared it with the list in the ballot box, and the votes in it, and found that they corresponded.

HOPKINS and MORGAN, for the motion.

RICE and PARSONS, contra.

DARGAN, J.—The circuit judge, in the exercise of the powers conferred on him by the act of 1840, prescribing the manner in which elections for sheriffs and clerks shall be contested, acts as the supervisor of the election, or the returning officer, for the purpose of advising the executive, whether the election is legal or illegal; and if legal, who was elected, in order that a commission may issue to him. In exercising these powers, he does not set as a judge pronouncing definitively on the rights of the opposing candidates to the office. See *The State ex. rel. Thompson v. The Circuit Court Judge of Mobile*, 9 Ala. Rep. 338; *Womack v. Holloway*, 2 Ala. Rep. 31. In this case the election was held—Spence was declared elected by the managers—it was contested in the mode prescribed by the act—and the circuit judge certified that Terry was elected. The first question therefore presented is, will a mandamus issue to the managers, or supervisors, of an election in favor of the party elected, if they have given a certificate of election to one not elected? In the case of *Rix as the Mayor of York*, Mr. Withers moved for a mandamus to have the corporate seal put to his certificate of election, alledging that he was duly elected recorder. This was apposed by the corporation, on the ground that Sinclair had received a majority of the votes at the election, and was duly declared elected, upon which the corporation certified his election to the secretary of state, that the king might approve of him. The rule was granted, and on the return, it appearing that Withers, and not Sinclair, had received a majority of the legal votes, a mandamus was awarded. See 4 Durnford & East Rep. 699, 5 vol. 66. And in the case of *Strong*, 20 Pickering, 484, it was held, that a mandamus would lie to the board of examiners, to compel

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them to give the petitioner a certificate of election, he having been elected a county commissioner, although the board of examiners refused to give him a certificate, and had ordered a new election, at which another individual had been elected; and they had given to him a certificate of election. These cases show, that a mandamus will lie to the managers of an election, to compel them to give a certificate of election to the party elected.

The office the petitioner claims, is that of sheriff of Talladega county, and we have seen that the circuit judge, in the exercise of the powers conferred by the act of 1840, acts as the returning officer, or manager of the election; clothed it is true, with the power to re-examine, and re-count the votes, and to reject such as are illegal. Yet his acts are not judicial, nor conclusively binding on the rights of the parties. This being the character in which he acts, a mandamus will lie, to compel him to give a certificate of election to the office of sheriff, or clerk, to the party legally elected, when it is withheld by the judge from him. See the case in 9 Ala. R. 338.

It then becomes necessary to ascertain in the first place, if Spence was duly elected sheriff of Talladega county. He was declared elected by a majority of two votes—Terry contested his election before the circuit judge—the votes were recounted by him, and evidence was taken by both parties to show that illegal votes had been given, and also to show, that the election had not been legally held at several precincts. The circuit judge pronounced, that Terry was elected, and in his return to the rule which was heretofore granted, he states, that he found in the ballot box at Hendricks' precinct, for Terry, six more votes than had been counted for him by the managers, and after rejecting all the votes shown to be illegal, whether given for Terry or Spence, that those six votes gave Terry a majority of two votes. He also states in his return, the votes he deemed illegal, and which were by him rejected, and the evidence upon which he judged them illegal. Also, the votes that each party contended were illegal, but which were allowed by him as legal votes, and the evidence produced to show their illegality,

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and by his return places the whole evidence introduced before him, before this court.

The votes actually given at the election, the legality of which is contested, are fourteen in number. Of these six were given for Spence; James Hanson, Thomas Waites, Jesse Blassingame, John Lienbaugh, John Shannin, and John Bonner. Smoot offered to vote at the election, but his vote was not received, and he would have voted for Spence. On Mason's vote, the word Pence was written, but this was rejected by the managers of the election, at which the vote was given, because he declared, when called on by the managers in counting the votes, that he did not intend to vote for sheriff at all. Of the votes contested, that were cast for Spence, three were rejected by the presiding judge—James Hanson, jr., Thomas Waites, and Jesse Blassingame.

The evidence is conclusive to show, that neither Hanson, nor Waites were twenty-one years old. These two votes were therefore properly rejected. But we think that Blassingame was a legally qualified voter; he came to the county of Talladega in 1845, and lived with his grandfather until some time in 1846, when he volunteered and went to Mexico. He returned to Talladega in May or June, 1847, and still continues to reside with his grandfather—although it is shown that his father resides in Marshall county, it is not shown that the voter had any other residence than in the county of Talladega, or that he claimed any other. It may be fairly inferred that the voter considered Talladega as the county of his residence, and his grandfather's as his house; his vote therefore should not have been rejected. It is contended, that the vote of Mason, on which was written the word Pence, should have been counted for Solomon Spence. The testimony shows, that the managers of the precinct where it was given, on the evening of the day of the election, on counting out the votes, called on the voter to know if he intended by it to vote for Spence. He then stated he did not, that he did not intend to vote for sheriff at all, and therefore had written on his ticket the word Pence. After this declaration, made by the voter, we think the managers properly refused to count this vote.

It is perhaps unnecessary to inquire whether the mana-

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gers should have permitted Smoot to vote, or not, for he did not vote, and even if his vote could have had any influence in changing the result of the election, as in fact it was not given, it could only have authorized the circuit judge to have declared the election void, but could not authorize him to count it as a vote actually given for Spence. But we incline to the belief, that the managers properly refused his vote; his place of business was at Wetumpka, in Coosa county, where he spent the most of his time; he had no residence in Talladega county, but his children remained with his brother, in Talladega, where the voter spent usually several months during the summer. But whether he was a qualified voter or not, as his vote was not given, his offer to vote could only set aside the election, if the vote would have changed the result; and therefore could not authorize the circuit judge to give to Spence a certificate of election, and he must show that he is entitled to a certificate of election, before the mandamus can be awarded.

The managers at the court house certified, that Solomon Spence received 711 votes; the circuit judge rejected three cast for him, when he should have rejected only two; this would give Spence 709. Terry received, according to the returns of the managers at the court house, 709—eight of which are contested as illegal, five of these eight were rejected by the circuit judge as illegal, to wit: the votes of Norton, Shelly, McCattery, Harrell, and William B. Easley, the sheriff of the county; and three were allowed as legal voters, to wit: the votes of J. F. Hunt, Robert Houston, and John Johnson. The testimony of Shelly shows, that Talladega had been the county of his residence; that in the fall of 1845 he went to Wetumpka, with the intention of remaining during the business season, and then of returning to Talladega; that he has always considered Talladega as the county of his residence, and only intended remaining in Wetumpka during the winter, or business season; that in May, 1846, he returned to Talladega, and joined a volunteer company raised in that county, and went to Mexico; he returned to Talladega in May or June, 1847, and has resided in that county ever since, and never has intended to abandon his residence in Talladega county. His testimony is not contra-

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dicted by any witness; we therefore think that he was a qualified voter, and the circuit judge should not have rejected his vote.

Harrell's vote is also a legal vote; he had been raised in Talladega county, and resided with his mother until the year 1847. He went to Coosa county and taught school three months, but never intended to abandon his residence. He returned to Talladega, a month or two before the election, where he still resides; certainly his absence from Talladega for a few months, on business, without any intention of becoming a citizen of any other county, or of abandoning his residence in Talladega, cannot deprive him of the political rights of a citizen of Talladega county. The circuit judge should not have rejected his vote. When a man has acquired a domicil by birth, or residence in one county, and goes to another county, or country, the question whether he has changed his domicil, depends mainly on the fact, whether his new residence is temporary or permanent—whether for the purpose of accomplishing a temporary object, or whether he intends it as his fixed abode. If the departure from one's fixed abode is for a purpose in its nature temporary, whether on business or pleasure, accompanied with the intention of returning, and he does return, without having altered his intention during his absence, such a departure, or absence from his domicil, will not deprive him of any of his rights, civil or political. See 1 Metc. Rep. 250; also, Knox v. Watmaugh, 3 Greenl. R. 455.

Having ascertained that these two votes should have been allowed for Terry, it is unnecessary to examine the legality of each vote any farther. We will not therefore determine whether Easley, the sheriff of the county was entitled to vote, or whether any other of the eight contested votes for Terry were legal or not; for if Terry is entitled to the six additional votes found in the box for him at Hendricks' precinct, then Spence did not receive a majority of the legal votes given at the election.

It is contended that the evidence shows that these additional six votes should not be allowed for Terry. The evidence is, the return of the managers, showing that Terry received fifty-two votes, also, Joshua B. Starns, who acted as

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one of the clerks, states, that he and Lewis were clerks of the election at this precinct; he thinks that the clerks compared their list after the result was ascertained, and thought at the time it was done, that the return sent to the managers at the court house was correct. That the managers sent one of the lists kept by the clerks, showing the result of the election at the precinct as their official return. The managers were Hendricks, Pyles and Bunt. Pyles, one of the managers, states, that it was his impression, from the tally sheets that were kept in counting out the votes, that Terry received at the precinct fifty-seven votes, and came to this conclusion from the fact, that other tally sheets were kept, and they all agree, that Terry received fifty-seven votes, except the one sent up as the official return to the court house, and this was kept by Lewis, who was one of the clerks. After the election was over, Hendricks, one of the managers, took charge of the ballots, or votes. They were not sealed up in his presence, but the ballot box was tied up with a string, in which the ballots were placed. The day before, the witness and Hendricks started with the ballot box to hand it to the circuit judge: Hendricks and himself took out from the box the list of the voters, to ascertain if particular persons had voted at that precinct; they returned the list of voters into the box, then nailed it up, and brought it to the judge. The ballot box was in the same condition when delivered to the circuit judge, that it was, when delivered to Hendricks, one of the managers, to keep, except that it was nailed up when they started with it, to deliver it to the judge. Bunt, another manager states, that the clerk kept two lists; he supposed they were correct. That one was sent to the court house, or to the sheriff, but does not think it contained the correct number of votes given for Terry at that precinct; for he thinks Terry received at that precinct fifty-seven votes. That the list kept by Starns, one of the clerks, and all the others agree in giving Terry fifty-seven votes. Mr. Lewis was the other clerk, and his list was certified to the managers at the court house. The witness did not examine the list kept by Lewis, but supposed they agreed; the clerks at the time spoke as if they agreed. The ballot box, with the ballots enclosed, was handed to Hendricks to be kept after the

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election. George W. Johnson states, that he examined the clerks' list, on the evening of the election, and that Terry received, according to the list, fifty-two votes. This is all the evidence, touching the number of votes Terry received at that precinct.

It is certainly true that the ballots, or votes themselves, are higher evidence than the certified lists, or number of votes sent by the managers at each precinct, to the managers at the court house, and if either party received more votes than were counted for him by the managers, the judge would correct this mistake, and count for each party all the votes given for him, even if they were not correctly numbered by the managers, on the day of the election. See 9 Ala. Rep. 338. This we do not understand to be contested, but it is said, that the ballots were not "*sealed up and secured*" as the statute directs; and on the contrary, the box has been opened, and the list of voters examined that was in the box, between the election and the time of the examination by the judge.

We think it beyond doubt true, that it is the election that entitles the party to the office, and if one is legally elected to an office, by receiving a majority of legal votes, the managers at the time of the election being legally appointed, and duly qualified to act as such, his rights to the office ought not to be divested by any omission of the managers, after it is held, or negligence on their part in not preserving the votes in the manner prescribed by the statute. It might be asked, if the managers could divest the right of the party elected, by any act whatever, if he were able to show that he was duly elected. The rule that has obtained, not only in the congress of the United States, but also in some of the legislatures of the States, is, that if the votes are legal, and the officers appointed to conduct the election are properly qualified, then omission, or neglect to make return within the time, or according to the mode prescribed by the legislature, does not vitiate the election, nor divest the title of the successful candidate to the office. In the matter of the contested election, between Van Rensselaer and Allen, one of the irregularities complained of was, that after the election, the ballot box was tied with tape, and not locked as required by the law of New

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York. Yet it was decided by the house of representatives of the United States, that this omission, after the election, did not vitiate it, or entitle the party contesting to reject the votes given in at this poll. This decision was made in 1793, and has been the rule recognized by that body ever since. They look to the qualification of the voter, and the officers who held the election, and do not permit the omissions, or neglect of the managers, after the election is over, to control its result. And we think this the correct rule, and that the statutes prescribing the mode in which the ballots shall be preserved after the election, is directory. And although it is highly important that they should be observed, yet if the managers fail in this respect to do their duty, the right to the office, if it can be ascertained correctly, is not to be divested by *such omissions*.

Having attained this conclusion, the next inquiry is, did Terry actually receive six votes more at Hendricks's precinct, than were counted for him by the managers. Six were found in the ballot box, and it is not shown that there were more votes or ballots found in the box, than there were voters, according to the list of voters. It is not shown that these six votes were surreptitiously placed in the box; indeed, two of the managers swear, that they believe he received more than were counted for him, and certified to the managers at the court house; and Lewis, whose list or tally was certified, has not been examined. Starns, the other clerk, only says, that he thought at the time, that his list agreed with that of the other clerk. Under this proof, and in the absence of all proof that these six additional votes for Terry were fraudulently inserted into the ballot box, after the election was over, we cannot come to the conclusion that they should be rejected, but on the contrary, think that the circuit judge properly allowed them for Terry.

It is then certain, that Spence was not elected sheriff, and therefore he is not entitled to a certificate of election to that office. But it is contended, that the testimony shows, that at *Rhinehart's precinct*, where Terry received a large majority, the managers were not sworn at all, and hence the votes at this precinct should be rejected, and the election declared void, for it is contended, that to make the election

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legal, the managers or officers appointed to hold and conduct it, must be qualified, and sworn according to the directions of the statute ; and if they are not, that the votes cast at the precinct at which they were appointed to preside as managers, must be rejected ; and if the vote at Rhinehart's be rejected on this account, the election should have been declared illegal and void, and so certified to the Governor by the circuit judge. If we admit that the circuit judge should have declared the election void, because the vote at Rhinehart's not only changes the result, but as the managers were not sworn, the election at that precinct is illegal ; but on this question we express no opinion. The question will then recur, does the writ of mandamus lie, not to compel the circuit judge to grant to the applicant a certificate of election, but to compel him to declare the election void, after he has revised it under the act of 1840, and granted a certificate of election to one of the opposing candidates. It is very clear, that the writ would be awarded to compel the judge to grant to the applicant a certificate of election, had he shown that he was elected, but as this is not shown, will the writ, at his motion, be awarded, to have the election declared void ?

The writ of *mandamus* will only be granted when there is a specific legal right, and there is no adequate legal remedy to enforce it. See 1 Ala. Rep. 15. If the right of the party applying for the writ, be merely equitable, the writ will not be granted. See *The King v. The Managers of Stafford*, 3 Term Rep. 651. And *a fortiori* it will not be granted, when the party applying for it, has no specific right, either legal or equitable. In the case of *The King v. The Abp. of Canterbury*, 8 East, 219, Lord Ellenborough said, in all cases there ought to be shown a clear specific right, as well as the want of a specific legal remedy, before the writ can be granted ; and as the applicant did not show any legal right which he claimed, more than was possessed by any other of his majesty's subjects, the writ could not be granted.

Spence not being elected, what specific right has he, in

the office of sheriff of Talladega county, more than any other citizen, or legal voter of that county? The answer can only be, he has none. He therefore has failed to show a clear specific legal right, and the writ cannot be granted.

Let the rule heretofore granted, be discharged.

CHILTON, J., not sitting.

CAWSEY v. DRIVER.

1. S & M, holding the patent of the government, sold the land to W C, taking his notes for the purchase money, executing to him a bond for title, when the purchase money was paid. W C put his brother, William C, in possession, who paid the first note, and judgment being obtained on the second, by an arrangement between the parties, the judgment was discharged by D, who, by the consent of William C, received an assignment of the bond from Wright C. Subsequent to this, William C filed a bill in chancery against D, to obtain title to the land, after which D surrendered the title bond to S & M, and took from them a conveyance of the land. Held, that the possession of William C, he having produced no written evidence of title, was not such an adverse possession as would invalidate the conveyance to D. That the pendency of the suit in chancery interposed no obstacle, and that the title of the defendant being purely equitable, could not be set up in a court of law, against the legal title.
2. A bill in chancery is not evidence for the party filing it.

Error to the Circuit Court of Chambers. Before the Hon. George W. Goldthwaite.

TRESPASS to try title, by the defendant, against the plaintiff in error.

From a bill of exceptions it appears, that the title of the plaintiff consisted of a conveyance by deed, from Stroud & McLemore, the patentees of the land, which was executed in the fall of 1844.

The defence was, that in 1838, one Wright Cawsey, the brother of the defendant, purchased the land from Stroud & McLemore, executed his notes for the payment of the purchase money, and received from S & McL a bond for title when the purchase money was paid. That Shortly after, the defendant went into possession, paid the note first falling due for the land, and judgment being obtained on the remaining note, by an arrangement entered into between the parties, the judgment was paid by the plaintiff, and by the consent of the defendant, the bond for title was transferred to him. It also appeared that previous to the conveyance of the land to the plaintiff, the defendant had filed a bill in chancery against him, to obtain a conveyance of the land. The defendant read the answer of the plaintiff to this bill, as evidence, and proposed to read the bill, but being called on to state what portion of the answer he wished to explain, and failing to do so, the court excluded the bill from the jury.

The court instructed the jury, that if all the facts in testimony were true, they constituted no defence to the action, which was excepted to, and is now assigned for error.

S. F. RICE, for the plaintiff in error, insisted, that the action was well brought. He cited Briggs v. Prosser, 14 Wend. 227; Gordon v. Kerr, 1 Wash. C. C. R. 322; Smede's Dig. 226, § 60; Paxton v. Paul, 3 Har. & McH. 339; Baldwin v. Leftwick, 12 Ala. Rep. 838; Barton v. Morris's Heirs, 15 Ohio, 429.

That the bill in chancery was competent to prove adverse possession *lis pendens*, &c. &c. Dexter & Allen v. Nelson, 6 Ala. 68; Pryor v. Butler. 9 Id. 418; Scroggins v. McDougald, 8 Id. 382.

GUNN, contra, cited 2 Sugden on Vendors, 162; 2 Story's Eq. 445; Bottsford v. Burr, 2 Johns. Ch. 404; Steene v. Steene, 5 Id. 1; Goodwin v. Hubbard, 15 Mass. 218; Stackpole v. Arnold, 11 Id. 27; 12 Mass. 109; 3 Pick. 205; 9 Johns. 166; 12 Id. 367; 7 Hill, 489; 3 Caine's Cases, 183; 4 Wheaton, 222; 4 Howard 25; 11 Peters 41; Foster v.

Goree, 5 Ala. 421; Scott v. Hancock, 3 S. & P. 44; Yarborough v. Moss, 11 Ala. 382.

CHILTON, J.—The main question presented upon the record is, whether the evidence of title as shown by the record, is sufficient to warrant and sustain the defence set up by the defendant below. The plaintiff produced a deed to himself from Stroud & McLemore, who held a patent from the government of the United States. He has the legal title to the premises, unless there is something shown in the record which would avoid his conveyance. It is insisted by the counsel for the plaintiff in error, that the deed from the patentees to Driver was void—1. Because Cawsey, at the time of the execution of this conveyance, was in adverse possession of the land. 2. Because, at the time of the execution of the said deed by Stroud & McLemore, a bill in equity was pending, and had been served upon them, at the suit of Cawsey, to obtain title, and that the deed was received by Driver, pending this suit in chancery, which defendant below insisted should avoid it.

The defendant below has not, nor is it pretended he ever had, any writing, showing he had an interest in the premises sued for. The bond under which he claimed, was executed by Stroud & McLemore to his brother, not to him, and this bond was transferred to Driver, who surrendered it to the obligors therein named, upon obtaining the deed. The defendant below, then, having no claim or color of title, did not hold adverse to the title of the plaintiff below. Indeed the proof clearly shows, the bond under which he claimed an equity was transferred to Driver by his consent. He cannot therefore insist, that his possession shall avoid the deed of Driver. See the case of Hinton v. Nelms, decided at this term; also, Wright v. Swan, 6 Porter's R. 84, and cases cited.

The conveyance to Driver, not being void by reason of the possession of Cawsey, a court of law cannot avoid it by reason of its execution pending the chancery suit. That court looks alone to the legal title, leaving the parties to settle their respective equities, and if Cawsey desired to prevent

the defendant in error from obtaining an undue legal advantage over him, he should have applied for an injunction.

In any aspect in which we can view this case, we cannot regard it otherwise than an effort in a court of law, to set up a mere equity to defeat a recovery upon the legal title, and to allow the defence, would be to break down the well established distinction between the jurisdiction of courts of law and equity, and would introduce a scene of confusion in the administration of justice most disastrous in its consequences.

The circuit court did not err therefore, in charging the jury, that if they believed the proof, the plaintiff was entitled to recover, for this would have been the proper judgment upon a demurrer to the testimony.

There was no error in refusing to allow the defendant to read the bill which he had filed, in evidence to the jury. The evidence was of his own creation, and for aught the court may know, fitted up for the occasion. We know of no rule which would justify it.

We are not able to see any error in the record, and the judgment of the circuit court is consequently affirmed.

IVEY v. PHIFER.

1. One to whom a stakeholder pays over money, as the supposed winner in a horse race, after notice by the other party not to do so, is a competent witness for the stakeholder, when sued by the supposed loser, for improperly paying it over.
2. A notice by one of the parties to a horse race, to the stakeholder, not to pay over the money deposited with him, unless all the judges of the race should determine, that V had won the race, cannot be countervailed by proof of the rules of racing, or the rules of "the Hayneville Jockey Club."
3. It is within the discretion of the court, to receive, or reject testimony,

when offered out of the usual course of procedure, and cannot be revised on error.

Error to the Circuit Court of Lowndes. Before the Hon. E. Pickens.

ASSUMPSIT by the plaintiff in error. It appears from a bill of exceptions, that the plaintiff, and one Vance, made a bet on a horse race of \$250, which was placed in the hands of the defendant as stakeholder, and upon the conclusion of the race, the stake was paid over by the defendant, to Vance, after notice from the plaintiff not to pay over. The defendant then offered Vance as a witness, who was objected to by the plaintiff, upon the ground, that he was interested, but was admitted to testify by the court, and the plaintiff excepted.

It was proved that the plaintiff said, he had no objection to the money being paid over to Vance, if all the judges decided he had lost the race. The defendant then offered to prove, that by the rules of the Hayneville Jockey Club, where the race was run, a majority of the judges decided, who won, or lost the race, unless the judges thought proper to allow an appeal to the club. The plaintiff objected to this testimony, but the court permitted it to go to the jury, and he excepted.

The plaintiff offered to introduce witnesses by way of rebuttal, to prove there had been foul riding, having in his opening offered one witness to prove that fact. But the court refused to permit it, and he excepted. These matters are now assigned as error.

J. D. F. WILLIAMS, for plaintiff in error.

1. The defendant below should not have paid over the money without the consent of Ivey, although in forbidding him to do so, Ivey annexed a condition to the notice. *Ivey v. Phifer*, 11 Ala. Rep. 539.

2. The testimony of Jewell furnished no defence for Phifer. It was therefore irrelevant, and calculated to mislead the jury.

WATTS, contra.

1. Vance was a competent witness. He was not inter-

ested in the event of the suit. He could neither gain or lose, directly or indirectly, by its result, and the judgment could not be evidence either for him or against him, in any suit which might be brought, either by Phifer or Ivey against him. It is clear that Ivey never could bring suit against him to recover the money lost on the race. And it is certain, if Phifer lost the present suit, he could never recover of Vance, the witness, the amount of money which Ivey might recover in this suit. Phifer having paid Vance with a full knowledge of the facts, could not recover against him in any event. If he has any interest, it is in the question, (not in the event of the suit,) and this does not disqualify him. See *Massey v. Rogan*, 6 Ala. 647; *Stewart v. Conner*, 9 Ala. 893, and authorities cited.

2. From the record, it appears that the foul riding was wholly irrelevant, and inadmissible as evidence. This being the case, it is no error to refuse to admit one piece of irrelevant testimony to rebut other irrelevant testimony received without objection. See *Stringer v. Young*, 3 Peters's Rep. 320; *Farmers' & M. Bank v. Whinfield*, 24 Wend. R. 420. But the testimony offered, in addition to being irrelevant, was such, (if relevant,) as should have been introduced in chief; and in regard to the admission of testimony of this sort, after the defendant had closed his case, it was discretionary with the court to admit or reject, and the exercise of this discretion is not revisable in error. See *State v. Marler*, 2 Ala. 43; *Towns v. Riddle*, *Ib.* 694.

COLLIER, C. J.—1. This cause was before this court at a previous term, but none of the questions now presented were then determined. 11 Ala. Rep. 535. The competency of Vance as a witness for the defendant, must depend upon the consideration, whether he can be affected by the result of the present cause. If a recovery by the plaintiff would subject him to liability to the defendant, it must be conceded, that he should not have been permitted to testify; for the judgment would be evidence against him, not only of the fact of its rendition, but also of the amount, though it might not conclude him from setting up any available matter of defence against the defendant. But looking to the

facts proved on the part of the plaintiff, and the testimony of the witness, and the *prima facie* presumption is, that a verdict against the defendant would not give to the latter a cause of action against the witness. It was satisfactorily shown, that the defendant was inhibited by the plaintiff from paying to Vance the money which had been deposited in his hands as a stakeholder. This was the conclusion upon facts not more strongly stated than those now exhibited in the record, when this cause was previously decided. The payment was then made in despite of a notice prohibiting it, and when it could not have been coerced. It must be regarded as having been voluntarily made, and though to one not entitled to receive it, yet it cannot be recovered back. This has been so often held to be the law, that it may be considered a settled principle. 1 Step. N. P. 328; Hill v. Green, 4 Pick. Rep. 114; Bogart v. Nevins, 6 Sergt. & R. Rep. 369; Irvine v. Hanlin, 10 Serg. & R. Rep, 219. As then the witness is not liable to the defendant, whether the latter succeed in his defence or not, he had no interest in the result of the controversy, and his testimony was properly admitted.

2. The notice which the plaintiff gave to the defendant not to pay over the money deposited with him, unless all the judges of the race should determine that Vance was the winner, was explicit, and could not be countervailed by proof of the *rules of racing, or the rules of the Hayneville Jockey Club*. It is altogether immaterial what these rules were—they could not determine the meaning of the notice, or impair its legal effect. Custom or usage in commerce frequently becomes so well established as to furnish rules for the government of transactions between men. But it cannot be endured that rules established among gentlemen of the turf, or those who indulge in other descriptions of gaming, shall be recognized as obligatory, so as to furnish guides for the adjustment of controversies in courts of justice, in cases where they cannot explicate either the law or the facts. The notice given by the plaintiff was sufficiently precise to have informed the defendant what he meant, without a reference to extraneous matter. The testimony referred to was, then, irrelevant, to say the least of it—was calculated

to mystify and mislead—instead of explaining the plaintiff's meaning, it opposed it, and therefore should have been rejected.

3. The plaintiff, in making out his case, adduced testimony to show that there had been "foul riding" on the part of the rider of Vance's horse; in the *cross-examination* the defendant introduced one witness, who testified that there had been "no foul riding;" then the plaintiff, by way of rebutting, offered two witnesses to prove the fact testified by the witness first examined by him, which the court refused to allow, on objection by the defendant. It is said that the examination of a single witness furnishes a miniature exhibition of the general course of examination in the whole cause; and that rebutting testimony must be confined to what is strictly a reply to facts elicited on the cross-examination. The party on whom the *onus probandi* lies of making out the case, or defence, cannot, without the permission of the court, introduce proof to the points to which the examination was directed, which does not tend to explain the cross-examination. If he has omitted from mistake, or other cause, to ask his question, or offer a witness, he can apply to the court for leave to supply the omission, by re-examining the same witness, or calling another who has not been previously examined. In short, it may be laid down generally, that the introduction of testimony out of the usual course of procedure, is within the discretion of the court, and this discretion should be exercised with a regard to justice, the interest and rights of the parties, and the proper disposition of business. But however it may be exercised, the propriety of the decision of the primary court in such a case cannot be revised by an appellate tribunal. In the case before us, the testimony rejected was not in reply to the cross-examination, but was cumulative—calculated to strengthen the plaintiff's case, in a point in which the witness by whom it was made out was not assailed as unworthy of credit; but the weight of whose testimony was merely lessened by countervailing proof. It follows then, that the circuit judge did not, in the rejection of the plaintiff's witness, commit an error of which

this court can take cognizance. 3 Phil. Ev. C. & H's Notes, 710 to 717, and citations there.

Upon the second point considered, the judgment is reversed and the cause remanded.

HEIRS OF BREWTON v. DRIVER.

1. No relief can be had upon a bill, the equity of which depends on a written contract, executed to another person, without its production, or establishing its loss, or accounting for its non-production, and proof of its contents. When the equity is derived from a bond for title to land, alledged to have been executed to a third person, if he is dead, his heirs are necessary parties.

Error to the Chancery Court of Benton. Before the Hon. W. W. Mason, Chancellor.

S. F. RICE, for plaintiff in error.

L. E. PARSONS, contra.

DARGAN, J.—The heirs of Brewton file their supplemental bill, praying for the specific performance of a contract for the sale of a quarter section of land.

The bill alleges that Cecil Brewton purchased the land of Rezen R. Chilton, and received from him a bond for title. That Chilton derived his title from McReynolds, who purchased of Jesse Duren, who was the agent of Eli M. Driver, in whom was vested the legal title. That Duren was authorized to sell, and that his sale was ratified by Driver. That the legal title is still in Driver, and the bill further prays, that it be divested out of him, and vested in complainants.

It is alledged in the bill, that McReynolds is dead, and his heirs are not made parties. The terms of the contract between McReynolds and Duren are not shown by the bill, nor is the contract by which Chilton became entitled to the equity in said land, set out.

The answer of Driver shows, that the legal title is in him, but he denies that Duren had the authority to sell, or that he ratified the sale.

Many witnesses were examined, and it appears from the proof, that McReynolds held a bond for title executed by Duren, as the agent of Driver and Moore, but the bond is not produced, or its absence accounted for. The testimony also shows, that McReynolds executed his bond for titles to the land to one McCampbell; but this bond is not produced, nor its absence accounted for. McCampbell, it appears, executed a bond for title to Patillo Chilton, and the witness heard him say that he had sold the land to Rezen R. Chilton. The only written evidence of title or claim produced at the hearing, is the bond of Rezen R. Chilton to Brewton.

The view we take of the case, renders it unnecessary to examine many of the questions raised upon the briefs.

The only equity that complainants can have against Eli M. Driver, consists in the bond for titles stated by the witness to have been executed by Jesse Duren, to McReynolds, even if Driver is bound by it; but this bond is not produced, nor are the heirs of McReynolds made parties.

The bare statement of these facts shows, that relief cannot be granted to the complainants. Their equity depends on a written contract, to wit, the bond executed to McReynolds. That parol proof cannot be admitted to supply its place, without first establishing its loss, or destruction, or some sufficient reason for its non-production, is a proposition so plain, that reference to authority to support it is unnecessary. Hence the record shows no legal evidence whatever, that McReynolds ever had an equitable title to the land, and as the complainants claim the title of McReynolds, it was incumbent on them to prove it.

There is no error in the decree dismissing the bill, and therefore it is affirmed.

CHILTON, J., not sitting.

McKEAGG v. COLLEHAN.

1. An indorsement of the sheriff, upon an execution, "the defendant has the plaintiff's receipt for the debt, interest and costs, in this case," is not a legal return and will not prevent an alias execution from being issued.
2. A receipt is open to explanation, and if fraudulently obtained, in discharge of an execution, or is without consideration, it will oppose no obstacle to a recovery.
3. A plea alledging that a receipt, and satisfaction, was obtained by fraud in the sale of a horse, is bad, as it states a conclusion of law, instead of stating facts.

Error from the Circuit Court of Dallas. Before the Hon. E. Pickens.

THE defendant in error exhibited his petition for writ of error *coram vobis*, and for supersedeas of an execution issued from the circuit court of Dallas county on a judgment in favor of the plaintiff in error, for the sum of \$132 66 damages, besides cost of suit, upon the ground that the said judgment, since its rendition, had been fully paid off and satisfied by him. It appears that the sheriff had returned a previous execution thus indorsed: "The defendant has the plaintiff's receipt for the debt, interest and cost, in this case. March 14, 1845. (Signed) J. F. Conoly, Sheriff D. C." A supersedeas of the execution having been awarded by the circuit judge, the defendant pleaded to the petition two pleas, viz: 1. That admitting the receipt mentioned in the sheriff's return and in the petition to have been executed by him, says the same was given in consideration of a horse, sold the said

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McKeagg, in satisfaction of said judgment, and by the said Collehan warranted to be sound, and which was unsound and wholly valueless, being diseased, and having died with glanders, which disease the said Collehan knew at the time of the said sale and receipt the said horse had, and wilfully, fraudulently and corruptly imposed him upon said plaintiff in the execution, and that the said horse was given alone in payment and satisfaction of said judgment.

The second plea avers generally that said receipt and satisfaction were obtained by fraud in the sale of a horse by Collehan to plaintiff in error.

A demurrer was sustained to each of these pleas, and the court proceeded to perpetuate the supersedeas, and gave judgment for the cost against the said McKeagg.

The overruling the demurrers to the two pleas is assigned as error.

GEORGE W. GAYLE, for plaintiff in error.

CHILTON, J.—The indorsement of the sheriff upon the execution was not a return. The writ commanded him to make the money specified in the execution, and the law confers upon him no authority thus to adjust the rights of the parties. There was, then, no such entry of satisfaction as would prevent the issuance of an *alias fi. fa.* This was done, and the defendant in the judgment became the actor to have it satisfied, by virtue of his receipt which he had obtained from the plaintiff. He undertakes to show to the court that the demand reduced to judgment, had been fully paid off. Now, if we admit the truth of the first plea, (and the demurrer does admit it to be true,) to allow the receipt given by the plaintiff in execution to have the effect of a satisfaction, we must either affirm the doctrine that its consideration cannot be inquired into, or, that having been obtained in consideration of the sale of a horse, falsely represented and warranted to be sound, when in fact he was *wholly worthless* by reason of disease, which disease was known to the seller, and, as the plea asserts, which horse, so diseased, was “wilfully, fraudulently and corruptly” imposed upon the plaintiff in execution, we must regard said receipt as a satisfaction in

full of said execution. We cannot give our sanction for a moment to either proposition. A receipt, though it be in full of all demands, is subject to explanation. If fraudulently obtained, or without consideration, it is inoperative and cannot be set up to defeat the plaintiff's right of recovery. The horse being wholly worthless, it was not incumbent on the plaintiff to aver that he returned, or offered to return him. These are familiar principles of law, and are so consonant with justice and common sense, as to render the citation of authorities unnecessary. The circuit court erred in sustaining the demurrer to the first plea, which though not very formal, at the same time substantially shows, that fraud and imposition in obtaining the receipt relied upon as a satisfaction renders it nugatory and void. The second plea is bad, as stating a legal conclusion, without setting out the facts from which such conclusion arises. For the error of the circuit court in sustaining the demurrer to the first plea, its judgment is reversed, and the cause is remanded.

JAMES v. STIGGINS.

1. S being entitled to a reservation by the treaty of Fort Jackson, leased the land to J, and received from J certain slaves, the labor of which he was to take as rent for the land during his life. It was further stipulated, that if the children of S, on coming of age, should convey to J their title to the lands, they should be entitled to the slaves. Held, that as this contract, so far as it relates to the heirs of S, was not binding on S, it was not for that reason binding on J, and that on the death of S, J could bring his action to recover the slaves, without yielding up to them the possession of the land, if he still retained it.

Writ of Error to the Circuit Court of Macon. Before the Hon. G. W. Stone.

THIS was an action of detinue at the suit of the plaintiff in error, for the recovery of certain slaves. The cause was put to the jury on the general issue. From a bill of exceptions sealed at the instance of the plaintiff, it appears that an agreement was made and entered into between the plaintiff and George Stiggins, which recites that the latter was entitled by patent from the general government, under the treaty of Fort Jackson, to a tract of land situate in Clarke county, and known as fractional section one, in township four and range three, east, lying on the west side of the Alabama river, containing 170 60-100 acres. It is further recited, that Stiggins being prevented by the treaty referred to, from conveying a fee simple title to the plaintiff, doth lease to the plaintiff the land above described, during the life of the lessor, without the molestation of him, his heirs, executors, &c., or any one claiming under him or them. In consideration of such lease, the plaintiff agrees that he will place in the possession of Stiggins the following slaves, Arena, Maria, Cyrus, and others who are specially named—all of whom are the property of the plaintiff. It is also stipulated, that the services of these slaves shall go to the use and benefit of the lessor, as an equivalent for the lease, from year to year during his life. The parties to the instrument further agree, that whenever the children of Stiggins, on attaining the age of twenty-five years, convey in fee simple their interest in the land respectively, to the plaintiff, his heirs and assigns, then the plaintiff, his heirs, &c., will relinquish a proportionable share of interest in the slaves particularized in the agreement, and their future increase, to each of the heirs who shall relinquish his right above provided. This agreement was signed and sealed by the parties, in presence of witnesses, and recorded in the offices of the clerks of the county courts of Macon and Clarke counties.

The plaintiff also proved the identity of the slaves sued for, with those described in the above writing—the value and hire of each—the death of George Stiggins previous to the institution of this suit, and the possession of the slaves by the defendants when the action was commenced. One of

the defendants is the widow, and the other a son of George Stiggins.

On these facts the jury was charged, "that the plaintiff was not entitled to recover without tendering back the land." Thereupon the plaintiff excepted, and submitted to a non-suit.

N. W. Cocke, for plaintiff in error.

1. The agreement between plaintiff and Geo. Stiggins, embraces two separate and distinct stipulations: The first is, the agreement of Stiggins to lease the land to plaintiff for and during his (S's) natural life, in consideration that plaintiff, as a full equivalent therefor, from year to year, had placed in his possession the slaves named in the instrument, for the term specified. This portion of the agreement was fully executed at the death of Stiggins.

2. The second stipulation is, the agreement of plaintiff, that if the children of Stiggins, when they respectively arrive at the age of twenty-five years, will convey to him in fee simple their interest in the land, he will then relinquish to each of them a proportionable share of the slaves and their increase. This was executory.

3. The second stipulation appears on the face of the instrument to be wholly without consideration, and without mutuality, and is therefore void.

4. If this be not so, the agreement leaves the legal title in the plaintiff, and vests in the children a mere contingent equity, which the defendants cannot set up against the legal title in a court of law, unless the agreement has superadded to that equity, the right of possession immediately upon the death of Stiggins.

5. There is no such stipulation in the instrument, and a court of law, whatever may be its speculations as to the intent of the parties, cannot add that which they did not include. Story on Cont. § 235: *Paysant v. Ware*, 1 Ala. 165; *Parkhurst v. Smith*, Willes' Rep. 332.

6. If the children have not reached the age of twenty-five years, the time has not arrived when they can assert any right under the provision in their favor. If they have reached that age, even a court of equity would not interpose in

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their behalf to prevent the plaintiff from recovering the possession of the slaves, unless they should shew affirmatively their ability to make a fee simple title, and an offer to do so. Performance on their part is a precedent condition.

7. If the agreement can be construed so as to make it a sale, it is then a sale of a life estate to Geo. Stiggins, with remainder to his children, contingent on their arrival at the age of twenty-five years, and their affirmance of the contract, and the remainder is void—at all events, unless the defendants can show that the contingency on which the remainder vested, happened before, or at the death of Geo. Stiggins.—*Price v. Price*, 5 Ala. Rep. 578; *Co. Litt.* 49, a, b, 378 a; *Plowd.* 25, 28; *Fearne on Rem.* 3; *Prest. on Est.* 71, 4; *Archer's case*, 1 Co. 65, 2 Co. 51; *Chudleigh's case*, 1 Co. 138; *Plow. R.* 25; *Mayor, &c. v. Alfred*, Cro. 576.

8. If the remainder is void, the slaves reverted to plaintiff on the death of Stiggins. 2 Cruise's Dig. 300, § 12.

JAS E. BELSER and G. GUNN, contra.

1. In the construction of contracts, the intention of the parties, (when that can be ascertained,) will govern. In arriving at this, the situation of all the parties, and the subject matter will be looked to, and when that intention is arrived at, will control, although at the expense of some portions of the instrument. *Wilson v. Troup*, 2 Cow. 195; *Sumner v. Williams*, 8 Mass. 214; *Fowle v. Bigelow*, 10 Ib. 377; *Hopkins v. Young*, 11 Ib. 302; 11 Pick. 154; *Hollingsworth v. Fry*, 4 Dall. 345.

The contract upon which plaintiff relies for a recovery may be stated thus: Stiggins was in the possession of a valuable settlement of land, to which he could not convey a fee simple title—his children, at the age of twenty-five years could convey—James desires to acquire the same, and agreed with Stiggins for a lease of the land, providing for a conveyance by the children of Stiggins, when they should arrive at the proper age, and binding himself to relinquish a proportionate interest in the slaves, to such child or children as should relinquish their interest in the lands. From which it is apparent that the intention of James was to acquire the

land, and that of Stiggins to acquire the slaves. Not that the contract should cease at the death of Stiggins, but that the same should continue, and that the children Stiggins, at or after their arrival at the agreed age, should have the slaves, upon relinquishing their interest in the land. Any other view of the contract would enable James to acquire the land without any equivalent. Besides, there is no power in the instrument for return of the slaves, or a possession of the land—such was not contemplated. The preamble will be looked to as a key to the other powers. This expresses an agreement on the part of Stiggins, his heirs, &c. of the one part, and James, and his heirs, &c. of the other part. Canal Co. v. Rail R. Co. 4 Gill & John. 4.

If this contract would admit of two constructions, one of which would make it operative, the other void, the former will be adopted. Archibald v. Thomas, 3 Cow. 284.

Although the instrument expresses that the services of the slaves shall be in full remuneration for the lease, from year to year, during the life of Stiggins, the other portions of the instrument, showing an intention to purchase, will control. Stouffer v. Coleman, 1 Yeates, 393; Neave v. Jenkins, 2 Ib. 107; Seaman v. Dill, 4 Ib. 295; Jackson v. Clarke, 3 John. 235.

The consideration of this instrument has been passed upon by this court, and affirmed to be good. James v. Scott, 9 Ala. 579; see also, Evans v. Boling, 5 Ib. 550; Overstreet v. Phillips, 1 Litt. 120.

This action is an effort on the part of James to rescind the contract in part, without showing any failure on the part of the children of Stiggins to comply—without delivering the possession of the land—without showing any eviction, or any disturbance of his possession—without offering to place the parties in *statu quo*—when it is apparent they could not be placed in *statu quo*—when there is no fraud, or allegation of fraud—which effort will not receive the sanction of any court. Clements v. Loggins, 1 Ala. R. 622; 9 Porter, 420; 2 Ala. 519; 4 Porter, 374; Cullum v. Br. Bank at Mobile, 4 Ala. R. 21; Cope v. Williams, Ib. 362; 3 Hayw. 109.

The agreement on the part of James, that upon the release of the children of Stiggins, to a proportionate share in the

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land, at or after their arrival at the proper age, is a valid contract, and vested a right in the children of Stiggins, which he cannot take from them, the same being a conditional sale. 8 Yerg. 96 ; Palmer v. Scott, 1 Russ. & M. 391.

• COLLIER, C. J.—In James v. Scott, 9 Ala. Rep. 579, we decided, that the first branch of the agreement by which the land was leased to the plaintiff, and the possession of the slaves yielded to the lessor as an equivalent for the rent, was a valid contract, and the plaintiff could not, while he occupied the land, recover the slaves of Stiggins, or one claiming under him during his life. We are now called on to determine whether the latter part of the agreement is obligatory on the plaintiff, so that he cannot, now that Stiggins is dead, maintain an action for the slaves.

The agreement is too explicit in its terms, to admit of serious controversy as to the meaning of the parties. It was obviously the intention of the plaintiff to enjoy the land during the life of the reservee, under the treaty recited, and after his death to acquire a fee simple title, if his heirs were willing to convey their interest upon attaining the age when, by the treaty and the law of Congress, they were competent to dispose of it. A conditional sale of the slaves cannot be predicated of any thing contained in the writing. They were merely placed in the possession of the reservee as a substitute for rent, with a stipulation, that if the plaintiff obtained a title under a purchase to be made of the reservee's heirs, the latter should become the proprietors of them. Whether the heirs would sell their respective portions of the land, was a matter depending upon their volition, to be exercised when the time appointed for their decision arrived.

It must be observed that the contract we are considering is altogether unilateral—it stipulates what the plaintiff shall do, but does not (in fact could not) undertake for the performance of any duty by the heirs of Stiggins—it provides what they shall receive as an equivalent for a contemplated act, but imposes no obligation to do the act. In this view, it is perfectly clear that the second branch of the agreement wants an essential element of a contract—reciprocity. Allen v. Roberts, 2 Bibb's Rep. 98 ; Cooke v. Oxley, 3 T. Rep. 653 ;

Humphries v. Carvalho, 16 East's Rep. 45; Lee v. Whitcomb, 5 Bingh. Rep. 34; Tucker v. Wood, 12 Johns. Rep. 190; Story on Con. 52, *et seq.* These citations abundantly establish that it is indispensable to the legal validity of a contract, that it should be mutually obligatory upon the parties, or it will be binding on neither of them.

The plaintiff, by bringing his action for the recovery of the slaves, has signified his purpose not to be bound by his undertaking to exchange them with the heirs of Stiggins for the land, conceding the agreement contemplates that after the death of the latter the slaves shall remain in the possession of the heirs until they are of sufficient age to assent or dissent to the sale of their respective interests. We have already intimated that the only term of the agreement that is obligatory, became *functus officio* upon the death of Stiggins, and whether any other duties and responsibilities as between the plaintiff and his heirs shall grow out of it, must depend upon a contract to be made *in futuro*. The writing, as it respects even the last branch of it, has no validity—it evidences a contract in *embryo*, ineffectual for all legal purposes, until life is imparted to it.

Under such circumstances, even if it can be presumed that the plaintiff still retains the possession of the land, was it indispensable to his right to recover that he should have offered to yield it to the heirs of his lessor? The contract being at an end by the operation of the law upon its terms, the effort to recover the slaves cannot with propriety be called a rescission of that part which never had validity. In no point of view can the agreement of the plaintiff to deliver up the slaves to Stiggins's heirs, if they would when competent, perfect his title to the land, be considered as more potent in law than a mere proposition to purchase from them when they became old enough to sell. Such a proposition might be withdrawn at the mere pleasure of the party making it, any time previous to its acceptance, so as to make a binding contract. Falls & Caldwell v. Gaither, 9 Port. Rep. 605. The defendants, then, as the legal distributees of George Stiggins, have no right to retain the slaves in question; nor can they insist upon being restored to the posses-

sion of land which the former leased to the plaintiff, as a condition precedent to his right to maintain the present action. The doctrine which requires a party to be placed in *statu quo* in order to rescind, does not apply where there is neither in law or fact, any thing having the form or the substance of a contract. It is not allowable for the defendants to set off the retention of the possession of the land against the enforcement of a clear legal right. If it be true that the plaintiff has continued to occupy the land since the death of George Stiggins, perhaps he would not be allowed to recover hire for the slaves, but the hires and rents would be set off against each other.

The judgment of the circuit court is consequently reversed, and the cause remanded.

REESE & HEYLIN v. BRADFORD, ET AL.

1. Without the aid of the statute of February, 1846, before a party can go into a court of equity, to enforce the collection of a simple contract debt, he must establish a trust in his favor, upon the effects he seeks to subject to its payment. The fact that the party against whom the relief is sought, has removed to another State, will not give the court jurisdiction of a purely legal demand.
2. Partnership creditors, as such, have no *lien* on the partnership effects, until in the case of land, they have obtained a judgment, and in respect to personalty, have execution issued. The *lien* which the partners themselves have, in the partnership effects, for the payment of the partnership debts, may in some cases be made available in favor of creditors, by their being subrogated to the rights and equities of the partners themselves.
3. One partner, may sell and dispose of the effects of the firm to his co-partner, and if the sale is fair, it will vest the exclusive title in the co-partner. If no *lien* is reserved by the retiring partner, none can be asserted by the creditors of the firm.

Writ of Error to the Chancery Court of Macon. Before the Hon. D. G. Ligon.

THE plaintiffs in error filed their bill, in behalf of themselves, and all the other creditors of the firm of Thomas & Hunter, who would make themselves parties to the same as complainants, and would bear their proportion of the expenses thereof. They alledge, that Thomas & Hunter commenced business in Tuskegee, as partners, in March, 1844, did an extensive business, and realized good profits. That in March, 1845, they went to the north, and purchased extensively, goods suitable to the market, and there purchased of complainants to the amount of \$686 89. That in September, 1845, they again made further purchases of complainants and others, and on the 21st of September, 1845, executed to complainants their three several promissory notes, two for \$686 87 each, and one for \$680, making the whole amount of indebtedness \$2,053 74.

The bill further alleges, that the goods purchased by Thomas & Hunter of the various houses in the northern cities, and which remain unpaid, amount to about \$22,000. That Hunter represented himself and his partner as possessed of real estate, and means ample to pay those debts at the time of the purchases, and which were untrue, and that at the time of making said purchases, they were insolvent. That on the 12th of December, 1845, and in furtherance of the original fraudulent intent of Hunter & Thomas, the said Hunter, in consideration of \$10 expressed to be paid by said Thomas, and the further covenant to preserve him harmless on account of the outstanding liabilities of the firms of Hunter & Thomas, Harvey King & Co. and John H. Thomas & Co., assigned all his interest in the stock in trade, goods, debts, accounts, &c. in said firms, to said Thomas. That on the 15th of January, 1846, the said Thomas made an assignment to one Joseph H. Bradford by deed, of the stock of goods, debts, accounts, &c. which were of said Hunter & Thomas, amounting in the aggregate to over \$22,000, together with certain real and personal estate belonging to said Thomas, which they charge is not worth more than \$8,000; which conveyance was in trust for certain preferred debts of

said Thomas, amounting to about \$11,000, and which is enlarged by several debts of Hunter & Thomas, but which are denied to be *bona fide*, amounting to about \$10,000. That after paying the expenses of said assignment, the said two sums of preferred debts, which amount to about \$22,000, the complainants' debt is permitted to come in *pro rata* with other Philadelphia and New York creditors, to receive the balance. That the possession, use, and enjoyment of the personal property, was secured to the said Thomas, for a period of six months, by the terms of said deed. That Bradford is authorized to sell the goods, either at public or private sale. That he has taken upon himself the execution of the trust, and is proceeding to sell the property, and collect the debts. The bill charges, that Hunter & Thomas entered into business, knowing they were insolvent, and to defraud complainants and others, by turning the goods and capital over to others, and particularly to the trustee.

The bill charges, that the assignment of Hunter to Thomas, was fraudulent, and was executed to enable Thomas to perfect the fraud on complainants, and his other creditors, and to enable him to appropriate the effects of the firm to his private debts. That the assignment by Thomas, to Bradford, was contemplated at the time of the assignment by Hunter to Thomas, and was executed with the intent to defraud complainant and other creditors. The bill charges that many of the debts classed as preferred, are simulated and fraudulent, and that the trustee, from a long acquaintance with the parties, knew them to be so. The bill further charges, that Thomas has withheld and applied to his own use, some of the most valuable debts due the firm; that some of the debts of complainant are not yet due. That the trustee is proceeding to dispose of the stock of goods, and collect the debts, and unless he is restrained, the whole amount will be lost to complainants. That Hunter and Thomas are insolvent, and Thomas has removed to the State of Georgia. That said Hunter & Thomas, and the trustee, have held out false representations to the creditors, in the situation of complainants, that if they would become parties to the assignment, their debts would be paid, and that this was done to enable the trustee to go on and collect the debts,

and dispose of the property and effects of the firm. The bill prays that the trustee be enjoined from further intermeddling with the assets of the firm of Hunter & Thomas, and that these assets be applied to the debts of the firm. That the deeds of assignment be declared void. That Bradford be decreed to account for all he has received of said assets. The bill was amended, but in nothing that alters the equity of the parties complainant.

The creditors named in the deed, whose debts are disputed by the bill, answer it, alleging that the debts are *bona fide*.

Bradford, the trustee, also answers, and admits that Hunter & Thomas, as partners, carried on business at Tuskegee; that they purchased goods in Philadelphia and New York, but knows nothing of the amount of their purchases, nor of their profits; nor does he know of the fraudulent design of Hunter & Thomas, in the purchase of the goods, nor in the assignment by Hunter to Thomas, and does not therefore admit the fraud. Admits that Thomas made an assignment to him, on the 15th day of January, 1846, of the stock of goods, notes, debts, &c., and that they were of the goods, debts, &c. formerly belonging to Hunter & Thomas, but respondent has not made any collection of them. That said Thomas also assigned to him, real and personal estate that belonged to him, of the value of twelve thousand dollars, as property usually sells, and that respondent has undertaken to execute the trust, and was proceeding to sell the property, and make the payments according to the deed of trust, when he was restrained by the injunction in this cause.

The answer further states, that the clause in the deed of assignment, allowing a portion of the property to remain with Thomas for six months, was suggested by respondent and his counsel, and was intended for the convenience of the respondent, as he lived some fifty miles distant from the residence of Thomas. The respondent denies that there was any understanding between Hunter, Thomas, and himself, for some time previous to the deed of assignment to him, to execute the same. Denies that the assignment made by Thomas to him, was conceived in fraud, or intended to enable Thomas to perpetrate a fraud on complainants, or any

one else ; or to enable Thomas to appropriate the partnership effects of Hunter & Thomas to the individual debts of Thomas. Denies all knowledge of any fraud in the assignment from Hunter to Thomas, and denies that he had any agency in it. That the debts preferred are *bona fide* debts, and due, so far as he knows or believes. Denies that he knew of the insolvency of Hunter & Thomas until within a few days before the assignment by Thomas to him was executed. That he has been selling the stock of goods, and endeavoring to collect the debts due the firm, for the purposes expressed in the deed. Denies that he ever overrated the value of the trust property, to induce the creditors to accept the trust. Denies all fraud on his part, or that there was fraud in the execution of the deed by Hunter to Thomas.

Hunter also answered the bill ; admits that he made purchases of goods in New York and Philadelphia, and executed notes, but denies all false or fraudulent representations as to his, or his partner's wealth ; or that any fraud was intended in the purchase ; or that the purchases were made without the intention of paying for the goods. Admits that he executed the assignment of his interest to Thomas, about the 12th December, 1845, but denies that it was done in pursuance of any fraudulent intention, previously formed, or for any fraudulent purpose whatever. Admits the execution of the deed of trust by Thomas to Bradford, and that he was called on and did sign it as a witness. Denies that he conveyed his interest to Thomas to enable him to perpetrate a fraud, or to enable him to appropriate the effects of the firm to his, Thomas's, individual debts. Denies that any of the preferred debts are simulated, or fraudulent, but states they are *bona fide*.

Thomas also answered—he admits the purchase of the goods of complainant, but denies that they were purchased with any fraudulent intent, or that they did not intend to pay for them. Admits the transfer of Hunter to himself, but denies it was made fraudulently ; he also admits the assignment from himself to Bradford, conveying the effects of Hunter & Thomas, and also real and personal estate, that

never did belong to the firm, but to respondent alone. That all the debts named in the assignment are *bona fide*. That the individual property assigned is of the value of about \$12,000. The individual debts of Thomas secured by the deed, about \$8000. Denies that the assignment of Hunter to him was fraudulent, or that it was intended thereby to enable him to perpetrate a fraud, or appropriate the effects of the firm to his individual debts.

The chancellor considering the remedy of the complainant full and adequate at law, dismissed the bill. This is now assigned as error.

BELSER and GUNN, for plaintiff in error.

1. There is enough on the face of the bill, to give a court of equity jurisdiction, although filed by simple contract creditors. The complainants and Thomas the grantor, were non-residents, and this independent of the partnership lien on the partnership assets, is sufficient. *Lucas, et al. v. Atwood, et al.* 2 Stewart, 381; *Ib.* 383; Acts of 1846, p. 17; *Kirkman v. Vanlier*, 7 Ala. 226; *Lawton v. Levy*, 2 Edwards' Ch. 201; *Scott v. McMillan*, 1 Litt. 305; *Jackson v. Cornell, et al.* 1 Sanford Ch. 353; *Miller v. Davidson*, 3 Gilman, 523; *Brown v. McDonald*, 1 Hill Ch. 301; *Winston v. Ewing*, 1 Ala. 129; *Moore & Co. v. Sample*, 3 Ala. 319; *Christian v. Ellis*, 1 Grattan, 396; 3 Kelly's Georgia Rep. 1 case.

2. The deed from Hunter to Thomas, in connection with the equitable right of their creditors, to have satisfaction 'out of the partnership effects, created a trust for the benefit of the said creditors, without preference, either at law or equity, and Thomas must be held as their trustee in the premises, and Bradford had notice of the trust, and therefore cannot defeat it. *Brewster v. Lane*, 4 Conn. 540; *Devereaux v. Fowler*, 2 Paige, 400; *McCauly, et al. v. McFarlane*, 2 Dess. 239; *Toppliff v. Vail*, Haw. Ch. 340; *McKenzie v. Jackson*, 4 Ala. 230; *Wood v. Dummer*, 3 Mason, 311; *Robbins v. Easley*, 1 Smede & Mar. Ch. 262; *Egbert v. Wood*, 3 Paige, 517.

3. The deed from Thomas to Bradford, according to the

facts of the case, shows an attempt on the part of an insolvent firm and a third person, to withdraw co-partnership funds from the reach of joint creditors, to satisfy individual debts of one of the partners. This cannot be done. It is going far beyond that honest preference of creditors which the law allows. Such assignments should not be enlarged so as to give new and dangerous facilities. *Jackson v. Cornell*, 1 Sandford Ch. 348; *Yale v. Yale*, 13 Conn. 185; *Weed v. Richardson*, 2 Dev. & Battle's Law, 536; *Freeman v. Finnall*, 1 S. & M. Ch. 623; *Lovejoy v. Bowers*, 11 N. Hamp. 404.

4. The instrument and evidence, aside from the idea of a trust for joint creditors, discloses a dealing for the benefit of Thomas, an insolvent grantor, which cannot be explained in the manner attempted. The discretion given to the trustee is a dangerous one, and for the benefit of the grantor, and the deed is a general assignment, not a mere mortgage. *Ashurst v. Martin*, 9 Porter, 566; *Gazzam v. Poyntz*, 4 Ala. 374; *Bank v. Borland*, 5 Ala. 531; *Ticknor v. Wiswall*, 9 Ala. 305; *Garland v. Rives*, 4 Ran. 282; *Hart v. Crane*, 7 Paige, 37.

5. According to the terms and reservations contained in the deed, all the creditors should have assented to it before the filing of the bill. The assent of one *cestui que trust* will not validate a deed which expressly or by implication requires the assent of others. *Hodge v. Wyatt, et al.* 10 Ala. 271; *Pinkard v. Ingersoll*, 11 Ala. 9.

6. All the circumstances go to show, that the transaction throughout, is a distinct one, and that it should not be upheld in a court of equity. The large purchases made by Thomas and Hunter in 1845—the time when the notes given for the goods were to fall due—the sale from Hunter to Thomas, and then from Thomas to Bradford, and the short period which elapsed between these transactions, show it to be a case of fraud. The case is materially different from the following, where the second class of creditors of the debtor trusted him on the faith of the goods. There was too much hot haste in this matter, to be legal or fair, and the deed on its face discloses the true transaction. *Toppliff v. Vail*, Haw. Ch. 341; *Parish v. Lewis*, Freeman Ch. 299.

7. After the dissolution of a co-partnership, one partner cannot, under his seal alone, assign the partnership effects, to trustees for the benefit of preferred creditors. *Egbert v. Wood*, 3 Paige, 18; *Story on Part.* 145-6-7-8-9-50; case of *Anderson v. Tompkins*, 1 Brock. 456.

8. It was not necessary for Bradford to be charged with notice of the fraud. He stood as a man would stand with a quit claim deed, affected with notice, and there can be no doubt, from the facts, that Thomas intended a fraud. See *Walker, et al. v. Miller & Co.* 11 Ala. 1067; *Frow & Ferguson v. Downman*, Ib. 880.

9. As to the *bona fides* of the transaction, the deed from Hunter to Thomas, and from Thomas to Bradford, are equally affected. No money was paid in either case by the grantees to the grantor.

DARGAN, J.—The first question to be examined is, whether a court of equity has jurisdiction under the facts alledged in the bill, to grant the relief sought by it?

The jurisdiction is attempted to be maintained, first, upon the ground that Thomas, one of the debtors, has removed from the State of Alabama, and now resides in the State of Georgia, and is insolvent. It is true, that if a party is not within the jurisdiction of the court, a court of equity will sometimes proceed against those who are, and afford relief, if it can be done consistently with the merits of the case, and the rights of the absent parties. See *Story Equity Pl.* 80; 2 *Mason's Rep.* 96; 7 *Cranch*, 69; 3 *Ib.* 220; 2 *Atkins' Rep.* 510.

But it is a well established rule, that if the parties absent from the jurisdiction of the court, are to be active in the performance of the decree, and are not mere passive objects of it, then a court of equity cannot proceed without having them before the court as parties, and if this cannot be done, no decree can be rendered. See *Mit. Pl.* 30, No. N.; *Story's Eq. Pl.* 81; 2 *Swanston's Rep.* 278. These rules are applicable when the subject matter of the bill is purely of equitable cognizance: hence defects in the powers of a court of equity existed. for it was in many cases incapable of af-

fording relief, because the proper defendant was not within the jurisdiction of the court, although the rights of the complainant might be exclusively of an equitable character. This defect has been remedied by statute in this State, and indeed in all the States of the Union—and in granting relief against an absent defendant, who cannot be served with process, courts of equity derive their authority from statutes. And it is beyond doubt true, that the mere absence of the party from the jurisdiction of a court of equity, and upon whom no service can be effected, cannot convert a pure legal demand into an equitable one, or give a court of equity jurisdiction over a legal demand, unless such jurisdiction is conferred by statute. For it would be absurd to say, that if the demand be of equitable cognizance, no relief can be afforded, because the defendant is beyond the jurisdiction of the court, and cannot be served with process, but if the demand be purely legal, and the defendant is beyond the jurisdiction of the courts of the country, this gives a court of equity authority to grant relief. Hence we will inquire if the demand of the complainants is legal, or equitable, and in what cases our statutes authorized courts of equity to proceed and grant relief against absent parties, in those cases where the subject matter is purely of equitable cognizance. See the *Heirs of Holman v. The Bank of Norfolk*, 12 Ala. Rep. 428.

The complainants are simple contract creditors, and they do not seek to enforce the trust created by the deed of assignment to Bradford, but to set it aside for fraud, and to subject the effects to the payment of their debts. As they are simple contract creditors, before they can come into a court of equity to collect their debts, or remove obstacles interposed to their collecting them, they must show either a lien, or that they had obtained judgments at law, the collection of which they cannot enforce without the aid of this court. See 1 Paige, 305; 4 Johns. Ch. Rep. 296; 3 Leigh's Rep. 299.

It is true, that in Kentucky, the absence of a party from the State, is held to be a ground upon which a court of equity will take jurisdiction of, and enforce the collection of a sim-

ple contract debt, against property liable at law to satisfy it, but this jurisdiction is claimed by statute only. See 5 Litt. 49; 9 Dana, 93. And previous to the act of February, 1846, there was no statute in Alabama that authorized a court of equity to take cognizance of a mere legal demand, and enforce the collection of it against property liable to execution at law, on the ground of the absence, or non-residence of the defendant. And in this bill is not filed under this act, nor in pursuance of its provisions, it can derive no aid from it.

The demand being a simple contract debt, and purely of a legal character, before the complainants can come into this court for its collection, they must establish a trust in their favor, upon the effects they seek to subject to its payment, and if they fail to do this, their bill is without equity.

It is contended, that the insolvency of the partners, and the transfer by Hunter to Thomas, creates a trust on the partnership effects, to pay the partnership debts; and as the complainants' debts are of that character, they are seeking to enforce a lien for their payment.

The partnership creditors, as such, have no lien on the partnership effects, for the payment of their debts; and they stand in respect to partnership property, as individual creditors do to the property of individual debtors, without having any lien thereon, until their debt is reduced to judgment, which will create a lien on *real estate*, and when execution is issued thereon, a *lien* is created on the personalty. See Sto. on Part. 509, 510. But as the partners themselves have a *lien* on the partnership effects, to pay the partnership debts, this *lien* may, *in many cases*, be made available in favor of the creditors. But the equity, or *lien* of the creditors, is to be worked out through the partners themselves; and when they can by this *lien* reach the partnership effects, and subject them to the satisfaction of their debts, it is because they are considered as subrogated to the rights and equities of the partners themselves, and not as having any *lien*, or equity upon the joint effects, by virtue of their debts merely, independent of this equity of the partners.

Having, then, no *lien* by virtue of their debts merely, the partners may sell, and dispose of the effects of the firm as they please, or as individual debtors may, for a *fair* and *bona fide* consideration, and their sales cannot be set aside by the creditors. One partner may sell to his co-partner, and if the sale is fair, it will vest the exclusive title in his co-partner. See Story on Part. 510; Ex parte Ruffin, 6 Vesey, 119, 126; 11 Vesey, 3, 5, 8. If the consideration of the transfer be, that the partner buying, shall pay the debts, this will not, by force of the contract, raise a trust in favor of the creditors, because they (the creditors) derive their *lien* from, or through the partners; and if the retiring partner parts with his *lien*, by the terms of the contract, and takes the personal security of the other to pay the debts, it would be difficult to maintain the proposition, that a creditor could assert a *lien* through the retiring partner, by virtue of an act that extinguished the *lien* of the partner himself. See Story on Part. 510; Gow on Part. 238 to 241.

By the terms of the deed from Hunter to Thomas, all the interest, right and title of Hunter, passed to Thomas, and no *lien* was reserved by the terms of the contract in favor of Hunter. But he relied on the personal security of Thomas alone, for the payment of the debts. If this deed is valid, or *bona fide*, it cuts off the equity of Hunter, and of course the creditors could not assert a *lien* through Hunter in their favor, if Hunter had none.

The answer of the defendants denies all fraud, as well in the execution of the deed to Thomas, as in the deed to Bradford; and there is no evidence to show, that the deed of the 12th of December, executed by Hunter to Thomas, was without consideration, or fraudulent. Hence, the complainants have failed to show a *lien* in their favor, and their debts being simple contract debts, not reduced to judgment, they cannot come into this court to ask for their payment. Their remedy is at law, and to that forum they must be remitted.

This conclusion renders it unnecessary to examine the questions raised on the deed of assignment to Bradford. Let the decree be affirmed.

CHILTON, J., not sitting.

INDEX.

ABATEMENT.

1. A suit against husband and wife, for a *tort*, does not abate by the death of the husband, unless the *tort* was committed by her in his presence, or by his coercion. *Douge v. Pearce*, 127
2. A plea in abatement of a pending suit, commenced by attachment, is bad, unless it alledges that the attachment was levied. The allegation that the attachment is still pending, is not sufficient. *Reynolds v. McClure & Wilson*, 159

ACCORD AND SATISFACTION.

See Payment, 1.

AMENDMENT.

1. The refusal of a court, pending a motion against the sheriff, to permit him to amend his return, cannot be assigned as error in the judgment upon the motion. If the party is prejudiced by the refusal, the remedy is by mandamus. *Caskey, et al. v. Haviland, Risley & Co.* 314
2. When upon the settlement of a guardian's account, a balance was found in his favor, *quere*, is it necessary to insert in the decree the amount of the ward's share of the estate. But if the account as recorded furnishes the means of ascertaining it, it may be amended, if desired, in this court, at the cost of the plaintiff in error. *Lucas & wife v. Hamilton*, 447

APPEALS AND CERTIORARI.

1. The time within which an appeal may be taken from a judgment of a justice of the peace, does not begin to run until the judgment has received the final action and approbation of the justice, whether he grants a new trial, entertains a motion for that purpose, or improperly sets his judgment aside, and afterwards reinstates it. *Moore v. Jones*, 296
2. When upon an appeal from the judgment of a justice of the peace, the defendant is the appellant, and the amount of the plaintiff's recovery is diminished, though not entirely defeated, the court may render judgment

APPEALS AND CERTIORARI—CONTINUED.

- against either party, as justice may require, and this discretion cannot be revised by an appellate court. *Dill v. Phillips*, 350
3. Neither appeal or *certiorari* will lie from the judgment of a justice of the peace to the county court, in a suit founded upon a *tort*, when the damages claimed do not exceed \$20. The "superior" court spoken of in the statute, to which the appeal is to be taken, is the circuit court. *Waddle v. Dumas*, 412

ASSUMPSIT.

1. If the sheriff discharge an execution, by paying the amount to the plaintiff, the defendant is liable to the sheriff in assumpsit, if he authorised the sheriff to make the payment, or assents to, and adopts it after it is made. A motion by the defendant to *quash* an *alias* execution, on the ground of such payment by the sheriff, is such a ratification and adoption of the act of the sheriff, as will make the defendant responsible to him for the amount. *Roundtree v. Holloway*, 357
2. Money lost upon a horse race, may be recovered back, if the suit is brought within six months from the time the money is paid to the winner. It is not necessary the defendant should plead that more than six months has elapsed before the commencement of the suit, as the right of action depends on the suit being brought within that period. *Samuels v. Ainsworth*, 366
3. B, an indorser on a bill of exchange, paid the amount to the bank, upon an agreement that the bank should prosecute their claim against T, a subsequent indorser, for the benefit of B, but the agreement was not to appear on the books of the bank. The bank obtained judgment against T, who was ignorant of the payment by B, collected the money, and paid it over to B. Held, that T could recover the amount so paid, of B, in an action of assumpsit. *Boyd v. Talliaferro*, 424
4. Indebitatus assumpsit will lie upon an executed parol contract; and although it is usual to count upon the special contract, and if it be conditional to aver performance of the condition, the common count is sufficient. *Dukes v. Leowie*, 457
5. A recovery may be had upon the common counts in assumpsit, of a bank, for the value of notes of the bank proved to have been destroyed, without an affidavit of the loss, previous to the institution of the suit. *The Bank of Mobile v. Williams*, 544
6. P represented to G, that a tract of land he was about to sell him in the State of Georgia, contained 240 acres, and thereupon conveyed it to him by deed, reciting that the tract contained 240 acres, more or less. The vendor afterwards agreed, that if the plaintiff would go on and take possession, and the land should fall short of 240 acres, he would make good any deficiency: Held, an action of assumpsit will lie for the breach of this contract. *Gordon v. Phillips*, 565

ATTACHMENT.

1. A plea in abatement of a pending suit, commenced by attachment, is bad, unless it alledges that the attachment was levied. The allegation that the attachment is still pending, is not sufficient. *Reynolds v. McClure & Wilson*, 159
2. In actions against a sheriff for failing to serve process of garnishment on a supposed debtor of the defendant in attachment, the judgment recovered by the plaintiff in the attachment suit, is evidence *prima facie* of the injury sustained, without producing the note on which the judgment was founded. *Kirksey v. Prior*, 190
3. When an attachment is wrongfully and maliciously sued out, the defendant is not confined to the remedy afforded by the bond, but may sue in case for the injury he has sustained, before the attachment suit is determined. *Donnell v. Jones, et al.* 490
4. The fact that a defendant sued in attachment is insolvent, is proper to be given in evidence, as a circumstance to be considered by the jury, in ascertaining the damages, but is no answer to the action, and therefore a plea relying on it as such, is bad on demurrer. *Ib.* 490
5. A loss accruing from a forced sale of goods, under an assignment, is not a natural, or proximate consequence of the issue and levy of an attachment by the creditor, previous to the making of the assignment by the debtor. *Ib.* 491
6. Under the general averments of the declaration, evidence is admissible to prove the general loss of credit, and mercantile character, but not to prove the loss of any particular customer. *Ib.* 491
See Damages, 4, 5, 6.
See Evidence, 26, 27, 28, 36, 37, 38, 39, 40, 41.

ATTORNEY AT LAW.

1. An attorney at law is a competent witness for his client, unless he has an interest in the suit. *McGehee, Adm'r, v. Hansell*, 17

BAILOR AND BAILEE.

1. An agreement, by which mares and colts are placed with another to be fed during the winter, the stock to be liable for the expense of keeping them, and the bailee to have the power of selling them to pay the expense, does not merely give the bailee a lien on the stock for the expense of their keep, but by the terms of the contract, gives him the right to sell so much as may be necessary to discharge the debt due for their keeping. If he sell more than sufficient, it is a conversion, and for such excess he is liable in trover. *Whitlock v. Heard*, 776
2. A purchase by the bailee himself, at a public sale by auction, is not absolutely void, but voidable at the election of the party, whose title is sought to be divested by such sale. *Ib.* 776

BANK.

1. A recovery may be had upon the common counts in assumpsit, of a bank, for the value of notes of the bank proved to have been destroyed, without an affidavit of the loss, previous to the institution of the suit. *The Bank of Mobile v. Williams*, 544

BANKRUPT AND ASSIGNEE OF.

1. A suit by the assignee of a bankrupt, must be brought within two years after the decree in bankruptcy, or after the cause of action accrues; and if this fact appears on the declaration, it will be reached by a demurrer — *Harris, Assignee, &c. v. Collins and Cartright*, 388

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. One who receives a bill, or negotiable note, before its maturity, in payment of a debt, is a *bona fide holder*, and is not affected by any force, or fraud in obtaining the bill, of which he had no notice. *Barney v. Earle, et al.* 106
2. When, upon the purchase of a plantation and slaves, on credit, a number of notes are executed, falling due during a series of years, if the maker discharges, or pays the notes first falling due, to the payee, he will be presumed to have availed himself of any payment, or set off, which then existed, and will not be permitted to make such a defence against an assignee of notes subsequently falling due. *Nelson & Hatch v. Dunn*, 259
3. If the notes so paid off by the maker, were assigned previous to payment, it was his duty to make the fact appear. Such assignment cannot be inferred from the declaration of the maker at the time of the execution of the notes, that he intended to transfer them. *Ib.* 259
4. At the time a bill of exchange was drawn, the drawer resided near Selma, where he had a plantation, and which was his nearest post office. That about two months before the maturity of the bill, he removed to Talladega county, with his family, some eighty miles distant, visiting his plantation occasionally, where his slaves remained; but there was no testimony, that the plaintiff, who resided in Mobile, knew of this removal, or of the residence of the drawer, further than might be inferred from his sending the notice to Selma. Held, that a notice of the dishonor of the bill, sent to him at Selma was sufficient, it not being shown that he had a fixed residence in Talladega. *Goodwin v. McCoy*, 271
5. H purchased bagging and rope from McC, who took his notes for the payment, and a bill of exchange as collateral security, and gave him a receipt, which stated the fact of the receipt of the bill as collateral security for the payment of the notes, and concluding, "the above acceptance of Thomas Haynes, to be given up on payment of above four notes." Held, that this did not make the bill conditional, or payable on a contingency, and that the proof of this fact was merely proving the consideration of the transfer of the bill. *Ib.* 271

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

6. If a suit be brought in the name of the payee of a note, for the use of one to whom it has been regularly assigned, this is an acknowledgment that the assignee is the proprietor of the paper; and the assignment being shown, the note should be excluded from the jury. So, if the assignment be stricken out pending the suit, the legal title in the note does not re-vest in the payee so as to enable him to maintain the suit. *Bullock v. Ogburn, use, &c.* 347
7. B executes his note to O, in satisfaction of a supposed demand due from the son-in-law of B to O, when in fact no such demand existed. Held, that the note was without consideration. *Ib.* 347
8. A notice of the dishonor and protest of a bill of exchange, which describes it correctly, but is silent as to the date and time of payment, is *prima facie* sufficient. The interpretation of such a paper is the province of the court, and should not be referred to the jury. *Saltmarsh v. Tuthill,* 390
9. A *bona fide* holder of a bill of exchange for value, which he has received before its maturity, and without notice of any defect or infirmity in the title of the party from whom he received it, may recover upon it, though the person from whom he received it acquired it by fraud. *Ib.* 390
10. H drew a bill of exchange in favor of C, on B & Co. which was indorsed by C, and one S, *on Sunday*, and handed by H to B & Co., by whom it was transferred to T, in substitution and extension of a bill for the same amount, on which T had previously advanced money, at a usurious rate of interest, T not having notice that the bill was indorsed on Sunday. Held, that T did not receive the bill, *bona fide*, in the usual course of trade, so as to exempt the paper in his hands from a defence which would have been available against it, as between the original parties; and that the indorsement on Sunday, being in violation of a public statute, was void. *Ib.* 390
11. A purchaser of a note, payable to C, or bearer, from one who was not the payee of the note, and had not the right to dispose of it, cannot defend against the true owner of the note, by proving he gave value for it. *Donnell v. Thompson,* 440
12. No action can be maintained on a note, which was made upon the consideration of running a horse race, and before the race was run, delivered up by the stakeholder, although it is again put in circulation by two of the makers, upon a valid consideration, one of the makers not being privy to, or assenting to such re-delivery. *Brewer and Holly v. Morgan,* 551
13. A direction to the holder of a note, "to return it to R S & Co., our agents in Mobile, who will pay it on presentation," is a declaration, that the note will be paid by R S & Co. on presentation, and does not make R S & Co. the agents of the holder when the note is returned to them,

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

whatever may have been their relation to the holder in regard to the note previously. *Cromwell, Haight & Co. v. Kidd & Co.* 576

See Damages, 8, 9.

See Gaming, 3.

CHANCERY.

1. A vendee, holding only a bond for title, cannot resist a recovery at law, when the vendor sues to recover the possession. His remedy is in equity to file a bill to redeem. A purchaser from the vendee without notice, is in no better condition, as it was his duty to inquire into the nature of the title he was purchasing. Notice to quit previous to the institution of the suit, is not necessary. *Chapman v. Glassell*, 50
2. It is no obstacle to the maintenance of an action at law, by the vendor, to recover the possession, that he is prosecuting a suit in chancery to foreclose his equitable mortgage. *Ib.* 50
3. Although the orphans' court may have taken jurisdiction of the settlement of an estate, yet if there are assets in the hands of an administrator not administered, and the settlement in the orphans' court, though it purports to be final, remains to be completed as to the various sums left in the hands of the executor, chancery may take jurisdiction. *Dement, et al. v. the Adm'rs of Boggess*, 140
4. In such a case, a bill may be filed by the vendor, against the vendee, to enforce the equitable lien, for the payment of the purchase money, without making the purchaser of the interest of the vendee at sheriff's sale a party, though he is in possession of the land, unless it be shown that he is connected with the equitable title sought to be foreclosed. *Driver v. Clarke & Givens*, 192
5. When a fraud has been committed upon a vendee in the sale of land, by the false representation of the vendor, that he had title, when he had none, the vendee may resort to chancery for a rescission of the contract, and a return of the purchase money paid, against the representatives of the vendor, without a delivery of the possession, the vendor having died insolvent. *Greenlee v. Gaines*, 198
6. A party who fails in the assertion of a good legal defence, or omits to make it at law, may, notwithstanding, avail himself of an independent ground of equitable relief. *Ib.* 198
7. A decree in chancery, vesting in the wife certain property of the husband, to her sole and separate use, upon the allegation that the husband was indebted to the wife an equal amount, is void, as against the creditors of the husband, if the design in instituting the suit in chancery was to hinder, or delay them, in the collection of their debts. *Hodges v. The Br. Bank at Montgomery*, 455

CHANCERY—CONTINUED.

8. It is only necessary in chancery pleading, to alledge the facts upon which the relief is sought; and though the proof of the fact consists of the admissions of the opposite party, it is not necessary to alledge in the bill, that such admissions were made. *Bishop's Heirs v. The Adm'r and Heirs of Bishop,* 475
9. It is not a sufficient ground for the interposition of chancery, after a judgment at law, that a witness called by the defendants, to prove that certain receipts had been paid in money, testified that they had been paid in jury certificates, by reason of which mistake the party lost the benefit of his payment. *Governor v. Barrow,* 540
10. Nor is it any ground of equity, that the witness was intoxicated. A party who voluntarily goes to trial, with a witness in this condition, does so at his peril. *Ib.* 540
11. A party who can only prove his defence, by the testimony of a co-defendant, may have relief in chancery, after a judgment at law against him. In such a case, it seems it would not be proper to file a bill for a discovery, pending the trial at law. *Jordan v. Loftin, et al.* 547
12. A court of equity, will not entertain a bill to enforce the specific execution of a contract in reference to personal property, unless compensation for a breach of the contract, will not give full, and complete redress, either from the nature of the contract itself, or from the peculiar character of the subject matter of the contract. *Savery v. Spence,* 561
13. All the trustees of a private land company, who have participated in the execution of the trust, or their personal representatives if they be dead, should be parties to a bill filed by a stockholder, for the settlement of the trust estate. *McKinley v. Irvine, et al.* 682
14. A bill is not multifarious, which makes two trustees, claiming under different deeds, parties, they being trustees of the same property, and having a common interest in defeating the claim set up by the bill. *Donelson's Adm'rs v. Posey, et al.* 752
15. The equitable right of a party to a set off, cannot be defeated by a transfer of the debt to a trustee. *Ib.* 752
16. A bill in chancery is not evidence for the party filing it. *Cawsey v. Driver,* 818
17. No relief can be had upon a bill, the equity of which depends on a written contract, executed to another person, without its production, or establishing its loss, or accounting for its non-production, and proof of its contents. When the equity is derived from a bond for title to land, alledged to have been executed to a third person, if he is dead, his heirs are necessary parties. *Heirs of Brewton v. Driver,* 826
18. Without the aid of the statute of February, 1846, before a party can go into a court of equity, to enforce the collection of a simple contract debt,

CHANCERY—CONTINUED.

he must establish a trust in his favor, upon the effects he seeks to subject to its payment. The fact that the party against whom the relief is sought, has removed to another State, will not give the court jurisdiction of a purely legal demand. *Reese & Heylin v. Bradford, et al.* 837

See Construction, 1.

See Deeds and Bonds, 1.

See Ferries and Bridges, 1.

See Vendor and Vendee, 9.

CLERKS AND THEIR DEPUTIES.

1. A clerk of the circuit or county court, must issue a writ of error on the application of any one against whom a judgment is rendered in his court, make out a complete transcript of the record, and deliver them to the party, his agent, or attorney, and has no right to require his fees to be paid in advance. *Parker and wife v. McGaha, Admr,* 344

CONTRACT AND AGREEMENT.

1. M being entitled under the law of congress to a pre-emption on a certain quarter section of the public land, agrees with T to abandon his claim and permit M T to take possession and make improvements, so as to entitle the latter to a pre-emption, and in consideration of an amount agreed to be paid him, does abandon his claim, and proves a pre-emption for M T—Held, that in an action by M against T for the price of his claim, the contract was void, and could not be upheld. *Tenison v. Martin,* 21
2. An agreement by which B sold S certain slaves, and S by a contemporaneous agreement, covenanted not to disturb the possession of B, under the penalty of \$2,000, is in legal effect a sale of the slaves by B to S, with a reservation of the right of possession by B, during his life. *Scott v. Barber,* 182
3. A father purchased certain slaves, paid for them with his own money, and took a conveyance of them in the name of his son, after which they were sold as the property of the father, under execution, and purchased by C. A few days after the purchase, they were secretly taken out of the possession of C, by the son, and whilst in his possession, were sold by C to N, by a conveyance reciting, "which said slaves have been removed or stolen from this county; I therefore convey the chance of said slaves only, and convey such title as is in me, or all the title I ever had at any time." Suit being brought by N, against the son, Held, that this was not the transfer of a *chose in action*, unless at the time of the sale, the son was in the actual possession of the slaves, openly asserting a title adverse to that of C: and that the title thus asserted by him was *bona fide*. That if the purchase under which the son claimed title, was made by the father, and the title taken in the name of the son, to defeat the creditor of the fa-

CONTRACT AND AGREEMENT—CONTINUED.

- ther, it would not prevent C, or one clothed with the title of C, from suing for the recovery of the property. *Hinton v. Nelms*, 222
4. A payment of part of the sum due upon a note, is not a sufficient consideration for a promise to remit interest due upon the note, or to delay suit. *Barron, Adm'r, v. Vandvert, Adm'r*, 232
5. All previous conversations or verbal agreements are merged in a written contract subsequently made; and when there was testimony of a written contract, it was error in the court to instruct the jury that the plaintiff might prove a fact by the contract in writing, or otherwise. *Cole v. Spann*, 537
6. If it was a term of the contract, that the defendant's cotton was to be stored in a fire-proof warehouse, and the cotton was lost by the failure to provide such a house, the plaintiffs must make good the injury. The fact that the defendant was in the warehouse, after he had begun to deliver his cotton, can have no influence upon the contract. *Hatchett & Bro. v. Gibson*, 588
7. If, after a contract to store the defendant's cotton in a fire-proof warehouse, the latter dispensed with the completion of the warehouse, and consented that it need not be made fire-proof, such consent, if given, cannot be withdrawn after a loss has actually occurred, though there was no additional consideration for such consent. *Ib.* 588
8. S being entitled to a reservation by the treaty of Fort Jackson, leased the land to J, and received from J certain slaves, the labor of which he was to take as rent for the land during his life. It was further stipulated, that if the children of S, on coming of age, should convey to J their title to the lands, they should be entitled to the slaves. Held, that as this contract, so far as it relates to the heirs of S, was not binding on S, it was not for that reason binding on J, and that on the death of S, J could bring his action to recover the slaves, without yielding up to them the possession of the land, if he still retained it. *James v. Stiggins*, 830

CONSTRUCTION.

1. A conveyance by deed, of "the south part of the east half of the north east quarter of section 27, township 16, and range 12, containing 40 10-100 acres," is not a conveyance of the south half of the half quarter section, without reference to quantity, but is a conveyance of the number of acres mentioned, of the south half of the half quarter section. This construction cannot be controlled by the patent for the same land, which describes it as containing 80 20-100 acres, nor is parol evidence admissible to show that the entire south half of the half quarter was intended to be conveyed, though chancery, in a proper case might reform the deed. *Lamar v. Minter*, 31

CONSTRUCTION—CONTINUED.

2. In construing a bill of exceptions, a particular expression, "as that there was no evidence of any indebtedness," if repugnant to other statements in the bill, will be understood to mean, that there was no *positive* proof of indebtedness. *Goodgame v. Clifton*, 583

CONSIDERATION.

1. A payment of part of the sum due upon a note, is not a sufficient consideration for a promise to remit interest due upon the note, or to delay suit. *Barron, Adm'r, v. Vandvert, Adm'r*, 232
2. To make an absolute bill of sale, with a defeasance, operate as a mortgage, they must be executed at the same time. If the defeasance be executed afterwards, without consideration, it is a *nude pact*. *Freeman, Adm'r, v. Baldwin*, 247
3. B executes his note to O, in satisfaction of a supposed demand due from the son-in-law of B, to O, when in fact no such demand existed. Held, that the note was without consideration. *Bullock v. Ogburn, &c.* 347

CONTRIBUTION.

1. When one surety sues a co-surety for contribution, for money paid by the former, for the principal debtor, the latter may show, that the surety suing for contribution was indebted to the principal debtor, in a larger amount than he was compelled as surety to pay for the principal, and defeat the right to contribution. *Bezzell, adm'r, v. White*, 422

CORPORATION.

1. The Alabama Life Insurance and Trust Co., has authority under its charter, to purchase a bill of exchange. *Gee v. The Ala. L. Ins. and Trust Co.* 579

COSTS AND SECURITY FOR.

1. If the clerk commits an error in the taxation of the costs, it will be corrected on a motion to retax the costs, but furnishes no ground for quashing the execution. *Spann v. Cole*, 473

COURT, SUPREME.

1. The supreme court will render the proper decree, when reversing a decree of the orphans' court, where the record furnishes the means of doing it. *Ashurst's Adm'r v. Ashurst's Heirs*, 782

COURT, CHARGE OF.

1. A party has a right to insist, that a proper charge shall be given, in the terms in which it is asked, and the giving a charge subsequently, the same in substance will not cure the error. *Hinton v. Nelms*, 222
2. A charge to the jury, that the plaintiff could maintain his action, "upon his possession, derived as heir of his deceased brother, and as his bailee,"

COURT, CHARGE OF—CONTINUED.

- is erroneous, as it is an invasion of the province of the jury, whose right it was to determine the character of the possession. *Phillips v. McGraw*, 255
3. A judgment will not be reversed because a charge, legal in itself, may not be sufficiently full, or is calculated to mislead the jury; but additional or explanatory charges should be moved for. *Casky, et al. v. Haviland, Risley & Co.* 314
 4. It is not a valid objection to a charge, that it is too general, and the jury might have been misled by it. It is the duty of the party objecting to it, to ask specific instructions. *Hodges v. The Br. Bank at Montg'y*, 455
 5. It is error for the court to refuse to give a proper charge, in the language requested. *Cole v. Spann*, 537
 6. When the facts are clear, and undisputed, the court may charge directly upon them, without hypothesis; and where the question is, whether the fact that there was no change of the possession, after an absolute sale of personal property, has been sufficiently explained, so as to repel the inference of fraud, may instruct the jury, that the facts, if true, do afford such explanation. *Henderson v. Mabry*, 713

CRIMINAL CASES, AND PROCEEDINGS IN.

1. One who has received a pistol from the State to keep until demanded, and who has given a bond for its return, has such a special property in it, as will sustain an allegation in an indictment for the larceny of the pistol, that it was his property. It will not vary the case, that the pistol is not in his actual possession; but is in the possession of his overseer. *Jones v. The State*, 153
2. It is not an error of which the prisoner can complain, that the jury omit to find the value of the stolen property. *Ib.* 153
3. Insanity intervening between the time of the alleged offence, and the trial, will not exculpate the prisoner. *Ib.* 153
4. If, from the appearance and conduct of the prisoner, when called on to plead, there is reason to believe he is insane, the court should institute a preliminary proceeding, to ascertain his sanity. Yet this must be left to the sound discretion of the court, and if the prisoner pleads to the indictment, the omission of the court to institute the preliminary inquiry cannot be assigned as error, though from the facts as set out in the record, there may be strong grounds for the belief, that the prisoner was insane at the time of the trial. *Ib.* 153
5. The wife of M having gone to live in the family of C, the former remarked to the latter that his wife had ruined him, and would ruin C, to which C replied, she had to live somewhere, and he would not turn her away. Held, that this admonition had no tendency to establish that there was an illicit connection between C and the wife of M. *The State v. Crawley*, 172

CRIMINAL CASES, AND PROCEEDINGS IN—CONTINUED.

6. The suspicion, or jealousy of the wife, of one indicted for adultery, cannot be adduced as evidence against him. *Ib.* 172
 7. Acts occurring eighteen months after the finding of an indictment for adultery, and not connected with other acts, occurring within the time laid in the indictment, cannot be given in evidence, though tending to prove an illicit connection. *Ib.* 172
 8. The party with whom the adultery is charged to have been committed, is a competent witness for the other party. The degree of credit to be given to the testimony, is a question for the jury. *Ib.* 172
- See Drunkenness, 1.
See Indictment, 1, 2.

CUSTOM OR USAGE.

1. J addressed a letter to N, a book-keeper in the house of F & B, grocers, in Mobile, requesting N to send him some groceries to Selma. N turned over the bill to the proper clerk of the house, who forwarded the goods as requested. N had previously lived in Selma, was indebted to J, and was insolvent. It was proved that clerks were in the habit of receiving orders from their friends, which they filled, and charged to their friends on the books of the house from which they purchased. Held, that it should be left to the jury, under the testimony, to determine the nature of the authority to N, and the liability of J to F & B. *Foster & Battelle v. Johnson*, 379

DAMAGES.

1. When a cause is submitted for trial on bill and answer, and the defendant denies the equity of the bill, and avers that the same was filed for delay, damages of six per centum, upon the judgment at law enjoined by the bill may be decreed. *Weissinger, et al. v. Johnson, et al.* 93
2. When an agent is instructed not to sell a horse for less than \$500, and he notwithstanding sells for a less sum, in an action by the owner against the agent, the measure of damages is not the difference between the price placed on the animal by the owner, and the sum for which it was sold, but the actual injury sustained by the breach of the instructions. *Ainsworth v. Partillo*, 460
3. The damages which a mercantile firm, composed of three individuals, can recover, in an action for wrongfully and maliciously suing out an attachment, must be for an injury done to their joint business, and must not only be the natural, proximate, legal result, or consequence of the wrongful act, but must affect the joint business, or trade of the partnership. Injury to the private feelings of the individual partners, is not a proper subject of inquiry. *Donnell v. Jones, et al.* 491
4. Proof of special damage, arising from the loss of reputation, credit, or business, or the withdrawal of particular customers, cannot be made, unless such special damage is averred in the declaration. *Ib.* 491

DAMAGES—CONTINUED.

5. A loss accruing from a forced sale of goods, under an assignment, is not a natural, or proximate consequence of the issue and levy of an attachment by the creditor, previous to the making of the assignment by the debtor. *Ib.* 491
6. Warehousemen, are bound to take reasonable, and common care, of any commodity entrusted to their charge; and if a loss occurs under circumstances which shows the want of such care, they are bound to make it good. *Hutchett & Bro. v. Gibson,* 587
7. If it was a term of the contract, that the defendant's cotton was to be stored in a fire-proof warehouse, and the cotton was lost by the failure to provide such a house, the plaintiff must make good the injury. The fact that the defendant was in the warehouse, after he had begun to deliver his cotton, can have no influence upon the contract. *Ib.* 588
8. The damages on a protested bill of exchange, drawn within this State, and payable in a sister State, is ten per cent. *Murphy & Brock v. Andrews & Bros.* 708
9. Interest cannot be computed on the damages. *Ib.* 708
See Recoupment, 1, 2.

DEEDS OF TRUST.

1. A provision in a deed of trust, that the trustee may wait until required by the *cestui que trust* to sell, does not have the effect to postpone the law day of the deed, the trustee being authorized to sell upon default of payment of the debt secured, nor is it a circumstance from which fraud can be inferred, that the trustee is invested with a discretion, as to the manner of selling. *Brock v. Headen,* 370
2. A sale of goods enclosed in boxes, and not exposed to view, is evidence of fraud; yet it cannot have the effect to render the deed of trust void, if *bona fide* in its creation. *Quere*—If the goods were of value sufficient to satisfy the demand of the creditor who caused the sale to be made, and there was no other demand to be satisfied out of the assigned effects, whether a court of law could declare the deed inoperative by reason of such sale? *Ib.* 371

DEEDS AND BONDS.

1. A conveyance by deed, of "the south part of the east half of the north east quarter of section 27, township 16, and range 12, containing 40 10-100 acres," is not a conveyance of the south half of the half quarter section, without reference to quantity, but is a conveyance of the number of acres mentioned, of the south half of the half quarter section. This construction cannot be controlled by the patent for the same land, which describes it as containing 80 20-100 acres, nor is parol evidence admissible to show that the entire south half of the half quarter was intended to be conveyed, though chancery, in a proper case, might reform the deed. *Lamar v. Minter.* 331

DEEDS AND BONDS—CONTINUED.

2. Although a deed recites, that the grantor has "granted, bargained, and sold," a tract of land, the title will not pass, if from the whole instrument, and a contemporaneous agreement executed by the parties, it is evident a title bond was intended by the parties, and not a conveyance of the land in *presenti*. *Chapman v. Glassell*, 50
3. A vendee, holding only a bond for title, cannot resist a recovery at law, when the vendor sues to recover the possession. His remedy is in equity to file a bill to redeem. A purchaser from the vendee without notice, is in no better condition, as it was his duty to inquire into the nature of the title he was purchasing. Notice to quit previous to the institution of the suit, is not necessary. *Chapman v. Glassell*, 50

DEEDS, AND REGISTRY OF.

1. To authorize the reading of a deed of trust in evidence, the execution of the deed must be proved, though it is recorded. *Brock v. Headen*, 370
 2. To authorize the registration of a deed of trust, the certificate of the probate should show, that it was executed on the day and year mentioned in the deed, and that the witnesses subscribed it in the presence of the maker of the deed, and in the presence of each other. *Ib.* 370
 3. An instrument which on its face purports to be under seal, will be considered a deed, though a scrawl is omitted to be made opposite the name. *Shelton v. Armor, et al.* 647
 4. A certificate of probate of a deed which recites, that "W. E. acknowledged his signature to the annexed deed, to W. B., for the purposes therein mentioned," is not sufficient to authorize the registry of the deed, or the reading a certified copy as evidence. *Ib.* 647
 5. A voluntary deed, delivered to the grantee, conveying to him slaves, reserving to the grantor a life estate, is operative at common law against purchasers, and subsequent creditors, and is also valid as between the grantee, and the personal representative of the grantor, although he dies in possession, and his estate is declared insolvent. *Adams v. Broughton, Adm'r, &c.* 731
 6. When such a deed is made in another State, and the property brought afterwards into this State by the grantor, there is no law requiring the deed to be recorded. *Ib.* 731
 7. Such an instrument, if made and delivered to a person in being, is a present gift passing the title immediately, and therefore not testamentary in its character. *Ib.* 731
 8. A conveyance of slaves by deed by one residing in Georgia, reserving to the donor the possession of the slaves during his life, and not made in contemplation of a removal of the slaves to this State, is valid in this State, without the registration required by the statute of frauds. *Ib.* 731
- See Drunkenness, 3.

DEBTOR AND CREDITOR.

See Chancery, 18.

See Partners and Partnership, 6, 7.

DEMAND.

1. A demand before action brought, is not necessary, unless a demand is necessary to render the detention unlawful. *Brock v. Headen*, 371
2. When an agent instructed to sell a horse, exchanges it for another, the act is a conversion, and the agent becomes liable to the owner, for the value of the animal, without a demand. *Ainsworth v. Partillo*, 460

DEPOSITION.

1. When a commission issues to three persons to take a deposition, if the parties appear before one of the commissioners, and cross-examine the witness, they cannot afterwards object, that one commissioner had not authority to act. *Douge v. Pearce*, 128
2. A deposition will not be rejected, because the clerk has made the commission returnable to a day when no court was held. *Scott v. Baber*, 182
3. The objection cannot be made for the first time at the trial, that the commissioner was related to the party taking the deposition, for the purpose of suppressing it. *Ib.* 182
4. A general objection to the reading of a deposition, as evidence, will not authorize the raising particular objections to it, in the appellate court. The objection must be specifically raised in the primary court. *Donnell v. Thompson*, 449
5. Where the rejection of a deposition, cannot, according to the rules of law, work any injury to the party offering it, its improper rejection, will not be an error for which the judgment will be reversed. *Ib.* 440
6. An objection to an entire deposition is not good, if part is sufficient. The objectionable part should be pointed out. The fact, that certain parts of the deposition were rejected, cannot make the refusal of the court to sustain the objection to a greater extent, an available error. *Hatchett & Bro. v. Gibson*, 588

DIVORCE AND ALIMONY.

1. A consent by husband and wife, to live apart, does not authorize either to charge the other with a desertion from bed and board, with the intention of voluntary abandonment. *Jones v. Jones*, 145
2. A marriage solemnized in this State, is not dissolved by an abandonment of one of the parties, unless sanctioned by a divorce in due form. *Wells v. Thompson*, 794

DOMICIL.

1. One who considers Talladega county as his place of residence, and remains in Wetumpka during the winter, or business season, and declares

DOMICIL—CONTINUED.

that he never intended to abandon his residence in Talladega, is qualified to vote in that county. *The State ex rel. Spence v. The Judge of 9th Judicial Circuit*, 806

2. When by birth, or residence, one has acquired a fixed domicil, a temporary absence, on business or pleasure, with the intention of returning, and an actual return, in accordance with such intention, will not work a change of the domicil. *Ib.* 806

DOWER.

1. When dower is assigned, out of adjoining lands, lying in contiguous counties, the party at whose instance it is done, cannot afterwards complain that the court had no jurisdiction to make an allotment out of the county. *Adams, and wife, v. Barron, Adm'r*, 205
2. A return of the sheriff, that he has assigned dower to the widow, "as shown by the annexed return," is sufficient, as it will be presumed, that the return annexed, is the report of the commissioners. *Ib.* 205
3. A designation of the tracts allotted as dower, by their designation at the land office, is sufficient, without describing them by metes and bounds. *Ib.* 205
4. An assignment to the widow, and putting her in possession, is sufficient, though she has a husband. *Ib.* 205
5. Notice of the time of the confirmation of the report of the commissioners, is not necessary. If injured by such confirmation, a motion should be made in the same court to set it aside. *Ib.* 205
6. The widow of one deceased, has no right to occupy a plantation belonging to her husband, several miles distant from his residence, in a town, as keeper of a hotel, until it is allotted to her, as part of her dower; consequently cannot retain the rents upon the ground of *quarantine*. *Smith's Heirs v. Smith's Adm'r*, 329
7. The orphans' court cannot award damages to the widow, upon the allotment of dower. *Ib.* 329
8. An administrator has no power to purchase the widow's dower right in land, with the personal assets. Nor will the fact, that the purchaser of the estate supposed the dower was extinguished, legalize the purchase made by the administrator of the widow's right. *Ashurst's Adm'r v. Ashurst's Heirs*, 781

DRUNKENNESS.

1. Although drunkenness reduces a man to a state of temporary insanity, it is no excuse for crime which is the immediate result of it. So, upon a trial for an assault with intent to murder, it is not error for the court to charge the jury, that the drunkenness of the prisoner should have no effect upon their consideration. *The State v. Bullock*, 413

DRUNKENNESS—CONTINUED.

2. Nor is it any ground of equity, that the witness was intoxicated. A party who voluntarily goes to trial, with a witness in this condition, does so at his peril. *Governor v. Barrow*, 540
3. A deed made by one who from excessive intoxication is deprived of the use of his reason, so that he is incapable of giving his serious, deliberate consent to the act, may be avoided, both at law and in equity, though the party claiming under the deed may have had no agency in producing the drunkenness. *Donelson's Adm'rs v. Posey, et al.* 752

EJECTMENT AND TRESPASS TO TRY TITLE.

1. The judgment in an action of trespass to try title, has no greater effect, as a bar to another action for the same land, than a judgment in ejectment. *Camp v. Forrest, and another*, 114
2. In an action of ejectment, a notice to quit is not rendered necessary, by proof of a contract between the defendant, and a stranger, between whom and the lessor of the plaintiff, no connection is shown in respect to the title of the property. *Petty v. Doe ex dem. Graham*, 568

ELECTIVE FRANCHISE.

1. In the case of a contested election, the circuit judge, under the act of 1840, acts as the returning officer, although he is clothed with power to re-examine and recount the votes, and to reject such as are illegal; and a *mandamus* will lie to compel him to give a certificate of election to the party legally elected, when it is withheld by the judge from him. *The State ex rel. Spence v. The Judge of 9th Judicial Circuit*, 805
2. The word "Pence," was written on a ticket, cast at an election for sheriff, at which *Spence* was a candidate. On counting out the votes, the managers called in the voter, who declared that he did not intend to vote in the sheriff's election, and therefore wrote the word "Pence" on his ticket. Held, that it was properly rejected by the managers. *Ib.* 805
3. When a vote is improperly rejected by the managers of an election, upon a contest before the circuit judge, he has not the power to consider the vote as cast for the candidate, whom the voter declares he intended to vote for. But if the improper refusal to permit the vote to be cast changed the result, the election should be declared void. *Ib.* 806
4. One who considers Talladega county as his place of residence, and remains in Wetumpka during the winter, or business season, and declares that he never intended to abandon his residence in Talladega, is qualified to vote in that county. *Ib.* 806
5. When by birth, or residence, one has acquired a fixed domicil, a temporary absence, on business or pleasure, with the intention of returning, and an actual return, in accordance with such intention, will not work a change of the domicil. *Ib.* 806

ELECTIVE FRANCHISE—CONTINUED.

6. The ballots, or votes themselves, are higher evidence of the number of votes cast, than the certified lists of the votes sent by the managers at each precinct, to the managers at the court house, and if either party received more votes than were counted for him, the circuit judge should correct the mistake, and count the votes. *Ib.* 806
7. If the managers at an election are legally appointed, and duly qualified to act, the right of one elected cannot be impaired by the neglect or omission of the managers, in preserving the votes after the election is over, in the manner prescribed by the statute. The statute prescribing the mode in which the ballots shall be preserved after the election is directory merely. *Ib.* 806
8. When the ballot box of a precinct is found to contain six more votes than were returned by the managers, for one of the candidates; when two of the managers swear that they believe he received more votes than were counted for him, and certified to the managers at the court house, and there is no proof that the additional votes were fraudulently inserted in the ballot box, after the election, the circuit judge should allow them. *Ib.* 806

ERROR.

1. If a defendant in chancery, omits to move the chancellor, to dismiss the bill for not having been filed in the proper county, he cannot assign it for error in this court. *Br. B'k at Mobile v. Rutledge and Watts,* 196
2. No objection can be taken in the appellate court, for the allowance, or rejection of any item of the account, or for the failure to allow commissions, unless an exceptive allegation be filed in the orphans' court, showing the ground of admission, or rejection. *Long v. Easley,* 239
3. The refusal of the court to permit the sheriff to amend an execution, pending the trial of a cause, cannot be assigned for error upon the judgment in the cause. *McCollum v. Hubbert and Caple,* 282
4. The refusal of a court, pending a motion against the sheriff, to permit him to amend his return, cannot be assigned as error in the judgment upon the motion. If the party is prejudiced by the refusal, the remedy is by mandamus. *Caskey, et al. v. Haviland, Risley & Co.* 314
5. A clerk of the circuit or county court, must issue a writ of error on the application of any one against whom a judgment is rendered in his court, make out a complete transcript of the record, and deliver them to the party, his agent, or attorney, and has no right to require his fees to be paid in advance. *Parker and wife v. McGaha, Adm'r,* 344
6. The refusal of a court to non-suit a plaintiff, because his recovery is less than \$50, is not a matter revisable on error. *Ainsworth v. Partillo,* 460
7. A writ of error cannot be prosecuted on a judgment of the court refusing to quash, in the name of the deceased party, as defendant to the writ.

ERROR—CONTINUED.

- The remedy, it seems, would be by an application to the supreme court for a *mandamus*. *Moore & Cocke v. Bell*, 469
8. A reference to the master, to ascertain the sum which by the decree is ordered to be paid to the complainant, does not render it interlocutory, when the principles are settled by the chancellor by which the amount is to be ascertained. *McKinley v. Irvine, et al.* 681
9. Upon a writ of error sued out upon a final decree in the orphans' court, against an administrator, he cannot assign for error, that he had been improperly removed from the administration, by a previous decree of the court. *Price v. Simmons, Adm'r*, 749

ESTATES OF DECEASED PERSONS.

1. The assets of an estate in the hands of an administrator, cannot be sold by execution for the payment of his debts, although he has made no return of the property levied on, and may be guilty of a *devastavit*, if he has not actually converted the property to his own use. *Br. Bank at Montgomery v. Wade*, 427
2. The possession and use of the property, by the administrator, is not evidence of a conversion, the administrator having married the widow of the intestate, and there being children of the former marriage in their minority. *Ib.* 427

EVIDENCE.

1. An attorney at law is a competent witness for his client, unless he has an interest in the suit. *McGehee, Adm'r, v. Hansell*, 17
2. A patent for land issued to Sheppard S. Johnson, and a deed for the same land was made by Spencer S. Johnson—Held, that it was admissible to prove that the patentee was known, when the patent issued, as Sheppard Spencer Johnson, and that the two names were intended to indicate the same person. *Lamar v. Minter*, 31
3. The declaration of one owning land on the opposite side of a line, insisted on as the proper boundary, is not admissible to prove the boundary, it not being shown that his testimony could not be obtained. *Ib.* 31
4. Under the act of 1836, "for the relief of tenants in possession against dormant titles," to entitle the tenant to compensation for permanent and valuable improvements, it is sufficient that his occupancy was *bona fide*, under color of title. And for the purpose of showing that his occupancy was adverse, he may prove by parol, that it was the intention of the plaintiff to sell, and of the defendant to purchase the land in controversy, though by mistake omitted in the deed. *Ib.* 31
5. M was living separate from his wife, who had gone to her father's, and M had commenced a suit to recover from T, the father, certain slaves which he had received upon the marriage. Whilst this suit was in progress, the

EVIDENCE—CONTINUED.

father stated to one H, that if M would dismiss his suit, and execute a release, he would put him on a place, let him have his family, and the use of the slaves, and if he would do right, at the end of five years, he would have regained his confidence. H did not know M at this time, and was not requested to communicate this to him, by T, but in a few days sought him out, and told him what T had said. Soon afterwards he visited T, and proposed to inform him what M had said. T inquired, if witness was sent by M, and being informed he was not, said it was well—that he should not receive propositions from M, but through men of his own age and named Roper, and others, as proper persons. Roper then, at the instance of M, visited T, to endeavor to bring about a reconciliation, but T declined to receive any proposition, or to grant an interview to M, until he had executed a release, and recognized the slaves to be his. This being communicated to M, he executed the release, and dismissed the suit; the parties met, and the release was delivered. M and T had a private interview, at the end of which T remarked aloud, that M had satisfied him; and he took back every thing he had said against him, adding, there were some things his family required explanation of, or Mrs. T could not be reconciled. M and his wife have not lived together since, but the breach between the parties has widened; and there was no proof that T had made any effort to bring about a reconciliation, or to do any of the acts he had proposed to H to do, if a release was executed by M. Held, that this testimony was relevant, and proper to go to the jury, as evidence of the inducements held out by T to M, to execute the release, and of the fact, that he knew they had been communicated to M, and had produced on the mind of M, the impression, that if he executed the release, his family would be restored to him. *Turnipseed v. McMath*, 44

6. If at the time of making a will, a testator is of sound mind, proof that twelve years before he had made a will, making a different disposition of his property, is irrelevant. *Roberts v. Trawick*, 68
7. The declarations of the testator, made before, and at the time of the execution of the will, or so shortly thereafter as to form a part of the *res gestae*, and necessarily connected with it, may be received, to prove fraud or undue influence in its execution. *Ib.* 68
8. Proof that one named as an executor in the will refused to take upon him its execution, is wholly irrelevant. *Ib.* 68
9. Upon a question of sanity, opinions of the capacity of the testator can only be given when preceded by the facts, or circumstances, upon which they are based; and can only be given by those whose long intimacy, and familiar and frequent intercourse with the deceased, qualifies them peculiarly to detect any mental alienation. *Ib.* 68
10. Testimony conducing to prove the unnatural character of the will, is admissible—as, that it deprived the most unfortunate of the testator's chil-

EVIDENCE—CONTINUED.

- dren of any participation in his bounty—or, that the testator was old, was in feeble health, of weak mind, or was prejudiced by his wife against his children. *Ib.* 68
11. When proof has been made, that a party admitted an account to be correct, the effect of the admission may be destroyed, or impaired, by proof, that it was hastily, or inconsiderately made, without a knowledge of the facts; but it is not admissible to prove, that in the opinion of others, he is not a man of capacity, or education, to understand long accounts, and is rather dull. *Stewart v. Conner,* 94
12. Parol evidence is inadmissible to establish, whether land was, or was not an Indian reservation, as higher evidence exists of the fact, at the general land office. *Mitchell v. Cobb,* 137
13. The suspicion, or jealousy of the wife, of one indicted for adultery, cannot be adduced as evidence against him. *The State v. Crowley,* 172
14. Acts occurring eighteen months after the finding of an indictment for adultery, and not connected with other acts, occurring within the time laid in the indictment, cannot be given in evidence, though tending to prove an illicit connection. *Ib.* 172
15. If, in answer to the usual concluding interrogatory put to a witness, to state any thing he may know favorable to the party taking his deposition, he discloses material matter, bearing on the question touching which he is examined, it cannot be rejected, on the ground that such answer was not specially called for. But if the answer could exert no influence upon the decision of the question, or point submitted to the jury, it may be rejected by the court. *Yarborough v. Hood,* 176
16. Parol proof of the entry of land, is not admissible, unless a sufficient reason is shown for admitting the secondary evidence. *Ib.* 176
17. In actions against a sheriff for failing to serve process of garnishment on a supposed debtor of the defendant in attachment, the judgment recovered by the plaintiff in the attachment suit, is evidence *prima facie* of the injury sustained, without producing the note on which the judgment was founded. *Kirksey v. Prior,* 190
18. P having had the use of the slaves of S, and his personal service for a year, after the death of S, promised the father of S, to pay him \$600 for the hire and services of S. Held, that although this promise was without consideration, yet the jury might consider it, as a circumstance, showing the estimate P placed upon the value of the services, and therefore not irrelevant. *Pope v. Randolph, adm'r,* 215
19. A deed by which F acknowledges himself indebted to B in the sum of \$1,600 with condition, "that if the above bound H F, does convey, and deliver to said D B, his heirs, &c., a certain negro woman, Rachel, and her child, named Reuben, conveyed and sold to the said H F, by the said D B, when the said D B pays the said H F five hundred and sixty two dol-

EVIDENCE—CONTINUED.

- lars, then this bond to be void," &c., whether regarded as a mortgage, or conditional sale, in the absence of proof of fraud, mistake, or surprise, cannot be explained by parol proof. *Freeman, adm'r, v. Baldwin*, 246
20. When the answer denies the execution of such an instrument, or alleges that it has been altered since its execution, by adding the condition, the execution must be proved. *Ib.* 246
21. The certificate of the clerk of the supreme court, that a judgment of the primary court had been affirmed on error, is *prima facie* evidence of the fact. *McCollum v. Hubbert and Caple*, 282
22. It is not competent to prove by reputation, that a party who had been in possession of land, occupied it as a tenant, and had no title. *Moore v. Jones*, 296
23. A witness (the wife of the defendant in attachment) was asked, "did you not, after the lot was rented to Wm. Byrne, for the year 1845, and before the rent was due, promise to pay debts to W & H, B & T, and M A and J H W, in a conversation between Wm. Houston and yourself, in the parlor of the Marion Hotel, or in the Marion Hotel, out of the rent due by said Byrne, for said lot, in 1845;" and she having answered in the negative—Held that the plaintiff might prove by Houston, that she did make such statements, for the purpose of discrediting her, she having been called by the opposite party, to prove his right to the rent of the land. *Ib.* 296
24. When one party introduces irrelevant testimony, the other may rebut it, and it cannot be objected that the fact which it was offered to rebut was irrelevant. *Havis v. Taylor*, 324
25. A record of a judgment properly certified, is evidence of the fact that such a judgment exists, against strangers as well as parties and privies. *Ib.* 324
26. In a suit for wrongfully and vexatiously suing out an attachment, a declaration by the plaintiff about a week before the attachment issued, of his intention to leave the State temporarily, not made in the presence of the defendant, or shown to have come to his knowledge previous to the issue of the attachment, is not admissible in evidence. *Ib.* 324
27. Proof of general reputation in the neighborhood, that the plaintiff was about leaving home for Arkansas, on a visit, is also inadmissible. *Ib.* 325
28. Declarations of the plaintiff, after the attachment issued, of his intention in leaving the State, are not competent. *Ib.* 325
29. A justice of the peace cannot be permitted to prove the contents of papers, or the proceedings had before him in his office, and which were reduced to writing, without showing first the loss, or destruction of the higher evidence. *Bullock v. Ogburn, use, &c.* 346
30. To authorize the reading of a deed of trust in evidence, the execution of the deed must be proved, though it is recorded. *Brook v. Headen*, 370
31. When a deed is not read as a recorded instrument, it is not an error prejudicial to the party against whom it is offered, that the clerk is permitted

EVIDENCE—CONTINUED.

- to prove, that the deed was proved before him, as stated in his certificate; though such proof might be improper, unless the certificate was attacked for fraud, or a clerical mistake attempted to be shown. *Ib.* 370
32. When a demand is proved to be extinguished, it is not necessary to produce the note which was the evidence of it *Ib.* 371
33. Evidence of a parol agreement, contemporaneous with an indorsement of a bond, that the indorsee should take other steps to collect the bond from the obligors than the indorsement contemplated, and that they had performed the agreement, and that subsequently the indorser had recognized the agreement, and advised the continuance of the steps they had taken to collect the bond, is inadmissible, as it contradicts the legal effect of the indorsement. *Carlton v. Fellows, Read & Co.* 437
34. It is competent for one who hands a note to another for collection, to prove his own declarations made at the time, showing his ownership of the note. *Donnell v. Thompson,* 440
35. Parol evidence is admissible to show, that a deed, or bill of sale, absolute on its face, was intended as a mortgage, or that it was executed and delivered upon certain trusts, not reduced to writing, and upon the proof being made, a court of equity will decree their execution. *R. Bishop's Heirs v. The Adm'r and Heirs of S. Bishop,* 475
36. The fact that a defendant sued in attachment is insolvent, is proper to be given in evidence, as a circumstance to be considered by the jury, in ascertaining the damages, but is no answer to the action, and therefore a plea relying on it as such, is bad on demurrer. *Donnell v. Jones, et al.* 490
37. Objections to testimony taken thus, in the court below, to exclude "the latter part of the answer of J D W, to the 4th interrogatory,"—"to exclude so much of the answer to the 5th interrogatory, as was matter of opinion,"—"to exclude all and every part of the testimony, which was offered by the plaintiff, showing their credit was impaired by suing out the attachment,"—and a general objection to the interrogatories to a witness, "to all and every interrogatory inquiring of specific damage, or loss, sustained by plaintiffs, and to all answers on that subject, and to all opinions of the witness," are too vague and indefinite to require the inferior court to act, or to enable an appellate court to supervise it *Ib.* 491
38. A leading question is one which suggests to the witness the answer desired, but a discretion must be left to the court trying the cause, to be exercised in reference to the character of the investigation, the condition and disposition of the witness, and the peculiar circumstances attending the examination. *Ib.* 491
39. Proof of special damage, arising from the loss of reputation, credit, or business, or the withdrawal of particular customers, cannot be made, unless such special damage is averred in the declaration. *Ib.* 491
40. A statement by a witness, "that from his acquaintance with the business

EVIDENCE—CONTINUED.

- of the plaintiffs, the issuing and levying of the attachment had the effect of destroying their credit and standing as merchants, and preventing them from carrying on their business, and forcing them into an assignment," is not admissible as evidence, being the opinion of the witness, or his deduction from facts, and not a statement of the facts themselves. *Ib.* 491
41. Under the general averments of the declaration, evidence is admissible to prove the general loss of credit, and mercantile character, but not to prove the loss of any particular customer. *Ib.* 491
42. The object of the defendant being to *recoup* the damages, it was competent for him, when sued for the advance, to prove the destruction of his cotton by fire, and the manner in which it occurred. *Hatchett & Bro. v. Gibson,* 587
43. The question being whether a warehouse was fire-proof, a witness stated he did not know what constituted a fire-proof warehouse, but that he knew what was regarded as such in Wetumpka, (where this house was situated,) and described the constituents of such a house, and that the plaintiffs' did not conform to it: Held, that although this answer was rejected by the court, it was allowable to refer to it, to determine whether another fact disclosed, was competent evidence. *Ib.* 588
44. Proof, that a witness introduced against the plaintiffs, had used expressions showing that he entertained ill feelings towards the plaintiffs, without proving what the expressions were, is inadmissible. *Ib.* 588
45. When the subscribing witness to a deed, voluntarily incapacitates himself from proving it, by becoming interested in it, the deed cannot be proved by secondary evidence. *McKintey v. Irvine, et al.* 682
46. A witness having sworn to facts, tending to prove a payment of the claim in suit, together with other demands, between the same parties, in October, 1834, it is not admissible to produce one of the claims referred to by the witness as being then paid, (but not the one in suit,) upon which was a credit, bearing date 1st February, 1835, either to discredit the witness, or to show that the claim sued on was a subsisting liability. *Hadjo, use, &c. v. Gooden,* 718
47. When proof has been adduced, that a witness had made contradictory statements, in respect to the facts he then deposed to, it is competent to sustain his credibility by proof of general good character. *Ib.* 718
48. A witness may be examined to prove character, who swears that he is acquainted with the general character for truth, of the witness assailed, in the neighborhood in which he lives, although he admits he was acquainted only with some of his neighbors, and had never heard any of them speak of his character for truth, or heard it called in question. *Ib.* 718
49. The execution of a bond by the persons styling themselves commissioners of the permanent seat of justice for Bibb county, is not proof of the fact as against third persons. *Carter & Logan v. Garrett,* 728

EVIDENCE—CONTINUED.

50. An account furnished by the clerk of a steamboat, showing that a quantity of wood had been furnished, is competent testimony of a debt due from the steamer, although it may not state with precision the amount due.—
Lynch v. Bragg, 773
51. A bill in chancery is not evidence for the party filing it. *Cawsey v. Driver*, 818
- See Gaming, 4.
- See Nuisance, 1.
- See Principal and Agent, 5.
- See Record and Judgment Roll, 2.
- See Sheriff and his Sureties, 1, 2.
- See Warehouse and Warehousemen, 2, 3, 4, 5, 6.

EXECUTION, AND WRIT OF.

1. A bond conditioned to make title to land, on the payment of the purchase money, is an equity merely in the vendee, which cannot be sold by execution at law against him. *Driver v. Clark & Givens*, 192
2. A variance between an execution, and the judgment to enforce which it was issued, does not render the execution a nullity, as it may be amended, so as to conform to the judgment. *McCullum v. Hubbert and Cuple*, 282
3. A sheriff having executions in his hands, made a levy on land, and went out of office, without making sale of it. The execution on which the levy was made coming to the hands of his successor after his qualification, he struck the name of his predecessor out of the levies, and inserted his own, altering the date to correspond with his reception of the execution, and sold under this levy. Held, that the sale was not affected by the previous levy of his predecessor. *Ib.* 290
4. A purchaser who has made full payment, entered into and retained the possession of land, but who has no other evidence of title, than a bond conditioned to make him a conveyance in due form, has not such a title as can be sold under execution at law. Nor will the purchaser at the sale, with the sheriff's deed, acquire such a title that he can maintain an action at law to recover the possession. *Elmore & Willis v. Harris*, 360
5. A return of satisfaction, upon an execution made by the sheriff, by the directions of the plaintiff's agent, precludes the plaintiff from issuing another execution, upon the judgment, whilst the return continues in force, and discharges the lien of the execution, as against a purchaser from the defendant in execution, who bought prior to the return being made. *Br Bank of Mobile v. Ford*, 431
6. Execution cannot be sued out on a judgment after the death of the plain-

EXECUTION, AND WRIT OF—CONTINUED.

- tiff, in his name, and if it is so issued, may be superseded by the defendant, and quashed on motion. *Moore & Cocke v. Bell*, 469
7. If the clerk commits an error in the taxation of the costs, it will be corrected on a motion to retax the costs, but furnishes no ground for quashing the execution. *Spann v. Cole*, 473
8. An indorsement of the sheriff, upon an execution, "the defendant has the plaintiff's receipt for the debt, interest and costs, in this case," is not a legal return, and will not prevent an alias execution from being issued.—*McKeagg v. Collehan*, 828
9. A receipt is open to explanation, and if fraudulently obtained, in discharge of an execution, or is without consideration, it will oppose no obstacle to a recovery. *Ib.* 828
- See Estates of Deceased Persons, 1.
- See Forthcoming Bond, 1.
- See Husband and Wife, 1.

EXCEPTIONS, BILL OF.

See Construction, 2.

EXECUTORS AND ADMINISTRATORS AND THEIR SURETIES.

1. When, in obedience to a *sci. fa.* one appears as administrator *de bonis non*, by his attorney, and proceeds to trial, it will be presumed that he was the representative of the deceased, and was regularly made a party to the suit. *McGehee, Adm'r, v. Hansell*, 17
2. An executor is entitled to a credit for payments made to a creditor of a legatee, by his direction. *Watson, et al. Legatees, v. McClanahan, Ex'r*, 57
3. An executor offering a will for probate, cannot take a non-suit. *Roberts v. Trawick*, 68
4. The orphans' court has no power to allow an administrator to apply the share of a distributee, to debts he claims to be due him from such distributee, unless the distributee consents to it. *Kidd v. Porter, Adm'r*, 91
5. The lien of a judgment upon the real estate of a deceased debtor, is destroyed by his death, and upon the declaration of the insolvency of the estate, before judgment on *scire facias*, subjecting the land, the estate vests in the administrator, for the purpose of paying all the debts *pro rata*. *Burk's Adm'r v. Jones & Allen*, 167
6. An administrator *de bonis non*, may sue in his own name, as such administrator, upon a note made payable to his predecessor in the administration. *Barron, Adm'r, v. Vandvert, Adm'r*, 232
7. An administrator is not under a moral obligation to perfect the title to land, the consideration of a note held by him in his representative character. *Ib.* 232

EXECUTORS, &c.—CONTINUED.

8. One executor, who is also a creditor of the estate he represents, may file his petition in the orphans' court, and compel a settlement and distribution of the estate, his co-executor having assets for which he fails to account. *King v. Shackleford*, 435
 9. An administrator, who has made a final settlement, and who has been charged with the amount of a note due his intestate, may, when sued by the maker of the note, offset the amount due upon it. *Hall v. Chenault*, 710
 10. Money received by an administrator upon a private sale of the land of his intestate, is not assets of the estate, with which he can be charged on his final settlement. *Ashurst's Adm'r v. Ashurst's Heirs*, 781
 11. The refusal of the orphans' court to allow the administrator $7\frac{1}{2}$ per cent. on his receipts and disbursements, is not erroneous, unless it be shown by clear and convincing proof, that more than the usual compensation should be allowed in that particular case. *Ib.* 782
- See Dower, 8.
 See Estates of Deceased Persons, 1, 2.
 See Orphans' Court, 9, 10, 11, 17, 18, 19, 20.
 See Wills and Testaments, 1.

FERRIES AND BRIDGES.

1. Upon a bill filed for an injunction, against an alledged usurpation of the complainant's right to the exclusive privilege of a ferry, at a place designated, describing himself as the lessee of the ferry from the commissioners of the seat of justice for Bibb county, a body corporate, to whom the ferry was granted by the court of revenue and roads for said county, the complainant is not entitled to relief, having failed to prove the corporate character of the commissioners, or a lease from them to him; these facts being put in issue by the answer. *Carter & Logan v. Garrett*, 728

FORTHCOMING BOND.

1. The levy of an execution on personal property, and the taking a forthcoming bond by the sheriff, does not affect the *lien* of the judgment, on the land of the defendants, though the bond be forfeited. Nor is the *lien* of the judgment affected, by the omission of the sheriff to return the forthcoming bond forfeited, or by his failure to return the execution. *Branch Bank at Montgomery v. Curry*, 304

FRAUD.

1. A release obtained by fraud is void. *Turnipseed v. McMath*, 44
2. The possession of personal property, obtained by a fraudulent contract, with one indebted at the time, will not ripen into a title by force of the statute of limitations, against the creditors of the vendor. *Powell v. Wragg & Stewart*, 161

FRAUD—CONTINUED.

3. A sale of goods enclosed in boxes, and not exposed to view, is evidence of fraud; yet it cannot have the effect to render the deed of trust void, if *bona fide* in its creation. *Quere*—If the goods were of value sufficient to satisfy the demand of the creditor who caused the sale to be made, and there was no other demand to be satisfied out of the assigned effects, whether a court of law could declare the deed inoperative by reason of such sale? *Brock v. Headen*, 371
4. When a purchase made by a ward, of his former guardian, is attacked for fraud, the former may show, that he was advised in the State of Georgia, to come to Alabama, and secure the debt by a purchase of the slaves in controversy; and that he did come in a few days, and make the purchase, for the purpose of explaining the transaction, and the motives which prompted the purchase. *Goodgame v. Clifton*, 583
5. A school master, with boarders in his house, and whose wife was in feeble health, being deeply embarrassed, sold five slaves for their full value, the money to be paid to the creditors of the vendor, with an agreement, that one of the slaves should remain in the family of the vendor, until the end of the year, she being the cook, and the only servant remaining after the sale. Held, that these facts, sufficiently repelled the inference of fraud, arising from the retention of the possession after the sale. *Henderson v. Mabry*, 713
 See Contract and Agreement, 3.
 See Sales under Judicial Process, 3.

FRAUDS, STATUTE OF.

1. A conveyance of slaves by deed by one residing in Georgia, reserving to the donor the possession of the slaves during his life, and not made in contemplation of a removal of the slaves to this State, is valid in this State, without the registration required by the statute of frauds. *Adams v. Broughton, Adm'r, &c.* 731

GAMING.

1. Money lost upon a horse race, may be recovered back, if the suit is brought within six months from the time the money is paid to the winner. It is not necessary the defendant should plead that more than six months has elapsed before the commencement of the suit, as the right of action depends on the suit being brought within that period. *Samuels v. Ainsworth*, 366
2. No action can be maintained on a note, which was made upon the consideration of running a horse race, and before the race was run, delivered up by the stakeholder, although it is again put in circulation by two of the makers, upon a valid consideration, one of the makers not being privy to, or assenting to such re-delivery. *Brewer and Holly v. Morgan*, 551

GAMING—CONTINUED.

3. H having received from S, property in pledge for his indemnity, lent his note to S for the purpose of raising money upon it. S lost the note at gaming, and the winner lost it in the same way. The third holder took it to H, who being ignorant of the facts, executed to him a new note, in lieu of the old one payable to him. After this, S notified H of the facts, and forbade the payment of the note. Held, that a payment by H, after notice, created no charge upon the property placed in his hands for his indemnity. *Whitlock v. Stewart*, 790
4. A notice by one of the parties to a horse race, to the stakeholder, not to pay over the money deposited with him, unless all the judges of the race should determine, that V had won the race, cannot be countervailed by proof of the rules of racing, or the rules of "the Hayneville Jockey Club." *Ivey v. Phifer*, 821
See Witness, 10.

GARNISHMENT AND GARNISHEE.

1. When a garnishee answered, that he would be indebted to the defendant in attachment, or to another person, who is named, in a certain sum, at a future time, the court may cause citation to be issued to such person, to contest with the plaintiff the right to the money. *Moore v. Jones*, 296
2. When the plaintiff controverts the answer of the garnishee, or the right of a transferee to the debt, an issue will be sufficient, if it re-asserts, that the garnishee is indebted, or conceding the answer to be true, denies that the assignee has any adverse rights. *Ib.* 296
3. The mere fact, that a bond for title to real estate is made to a married woman, does not establish that it is her separate estate, at least in a court of law; and if the property be occupied by tenants, the husband may sue for the rent, or the tenant may be garnisheed by the husband's creditors. If the wife has any equitable rights, she may assert them in a court of equity. *Ib.* 296

GIFT.

1. A father desiring to give his son the use of three slaves for a year, hired them to P, with directions to pay the hire to the son, which P promised to do—Held, that this was not the transfer of a *chose in action*, and that the administrator of the son, could maintain an action against P, for the hire. *Pope v. Randolph, Admr*, 214
2. A gift of the use, or hire of slaves for a year, the slaves being delivered to the person hiring, to consummate the gift, is complete by such delivery, and cannot be revoked by the donor. *Ib.* 215
3. Delivery of possession, or something equivalent to it, is an essential ingredient of a gift. *Phillips v. McGrew*, 255
See Deeds, and Registry of, 5, 6, 7, 8.

GUARDIAN AND WARD.

1. When upon the settlement of a guardian's account, a balance was found in his favor, *quere*, is it necessary to insert in the decree the amount of the ward's share of the estate. But if the account as recorded furnishes the means of ascertaining it, it may be amended, if desired, in this court, at the cost of the plaintiff in error. *Lucas & wife v. Hamilton*, 447

HOTCHPOT.

1. The widow can claim nothing from advancements made by the husband to his children, and by them brought into hotchpot. *Logan v. Logan, Adm'r*, 653

HUSBAND AND WIFE.

1. A judgment against a female *dum sola*, but no execution issued thereon until after her marriage, creates no lien whatever on her property, and constitutes no impediment to the levy of an execution on the property, upon a judgment obtained against the husband and wife. *Haygood v. Harris*, 65
2. A suit against husband and wife, for a *tort*, does not abate by the death of the husband, unless the *tort* was committed by her in his presence, or by his coercion. *Douge v. Pearce*, 127
3. A consent by husband and wife, to live apart, does not authorize either to charge the other with a desertion from bed and board, with the intention of voluntary abandonment. *Jones v. Jones*, 145
4. The mere fact, that a bond for title to real estate is made to a married woman, does not establish that it is her separate estate, at least in a court of law; and if the property be occupied by tenants, the husband may sue for the rent, or the tenant may be garnished by the husband's creditors. If the wife has any equitable rights, she may assert them in a court of equity. *Moore v. Jones*, 296
5. The husband is an incompetent witness for the wife, in a controversy in which she is asserting property levied on as the property of the husband, to be her separate estate. *Hodges v. The Br. Bank at Montgomery*, 455
6. A decree in chancery, vesting in the wife certain property of the husband, to her sole and separate use, upon the allegation that the husband was indebted to the wife an equal amount, is void, as against the creditors of the husband, if the design in instituting the suit in chancery was to hinder, or delay them, in the collection of their debts. *Ib.* 455
7. The right of a married woman to recover interest upon a general legacy, is not affected by the fact that no trustee had been appointed to act for her; especially in a case where the executors had determined not to pay legacies, until the estate could be made available without a sacrifice. *Hallett and Walker, Ex'rs, &c. v. Allen, &c.* 554
8. The widow can claim nothing from advancements made by the husband

HUSBAND AND WIFE—CONTINUED.

- to his children, and by them brought into hotchpot. *Logan v. Logan, Adm'r*, 653
9. The husband is a tenant by the curtesy, of waste and uncultivated lands, not held adversely by another, of which the wife had only the legal seizin, if the other incidents necessary to create the tenancy by curtesy exist.—*Wells v. Thompson*, 794
10. The adultery of the husband is not a forfeiture of the tenancy. *Ib.* 794
11. Though the husband may forfeit his estate, as tenant by the curtesy, by a wrongful alienation, tending to the disherison of the reversioner, or remainder man, the sale of his interest as tenant, has no such effect. *Ib.* 794

INDIAN TITLES.

1. Parol evidence is inadmissible to establish, whether land was, or was not an Indian reservation, as higher evidence exists of the fact at the general land office. *Mitchell v. Cobb*, 137
2. The failure of an Indian reservee, or his or her heirs, under the provisions of the treaty of the 24th March, 1832, with the Creek tribe of Indians, to take possession of the land allotted to them, or in any manner to signify a desire to remain in this state, after the five years expired, determined the estate to which they would otherwise have been entitled, and the land re-vested in the United States, without an entry, or other act on the part of its agents. *Wells v. Thompson*, 793

INDICTMENT.

1. An indictment need not conform to the exact words of a statute, creating the offence. It is sufficient if the words used in the indictment descriptive of the offence, are equivalent to those used in the statute. *The State v. Bullock*, 413
2. An indictment charging that the prisoner, "with a certain large knife, which he then and there had and held, at and against the body of the said H W R, then and there did cut, thrust and stab, with the intent him, the said H W R, then and there, feloniously, wilfully, and of his malice aforethought, to kill and murder," sufficiently states that the intent to commit the act was by the use of the weapon described. *Ib.* 413

INDORSER AND INDORSEE.

1. B, an indorser on a bill of exchange, paid the amount to the bank, upon an agreement that the bank should prosecute their claim against T, a subsequent indorser, for the benefit of B, but the agreement was not to appear on the books of the bank. The bank obtained judgment against T, who was ignorant of the payment by B, collected the money, and paid it over to B. Held, that T could recover the amount so paid, of B, in an action of assumpsit. *Boyd v. Talliaferro*, 424

INDORSER AND INDORSEE—CONTINUED.

2. When a writ is properly sued out against the maker of a note, judgment obtained, and the statutory return of "no property found," made by the sheriff, it will be sufficient to charge the indorser, though it be shown, that the maker removed to another county, after the institution of the suit. *Quere*, if the indorsee is informed of such removal, and that an execution would be more likely to be availing there, than if issued in the county in which the judgment was obtained, would it not be his duty to send it to such county? *Weed & Co. v. Brown*, 449
3. A writ is properly sued out, so as to charge the indorser, although the maker removed from the county a few days previous to the institution of the suit; it not appearing that such removal was open, visible, and notorious, or that the indorsee had knowledge of the fact; or that the maker was a freeholder in the county to which he removed, or was exempt from suit in the county in which he was sued. *Ib.* 449
See Evidence, 33.

INDORSEMENT.

1. An indorsement of a note may be made on the paper on which a torn note is pasted, so as to vest the legal title in the indorsee. It is not necessary in such a case, any more than in an indorsement on the note itself, to prove when it was made. *Crutchfield v. Easton*, 337

INFANT AND PROCHIEU AML.

1. An infant, ten days before his majority, in the purchase of a note, drew an order on a third person, of the non-payment of which he had notice. Being sued several years after, upon the order, Held, that his omission to return the note, or disaffirm the contract, after he attained his majority, warranted the implication that he intended to abide by his contract, and countervailed the defence of infancy. *Thomasson v. Boyd*, 419

INSANITY.

1. Insanity intervening between the time of the alledged offence, and the trial, will not exculpate the prisoner. *Jones v. The State*, 153
2. If, from the appearance and conduct of the prisoner, when called on to plead, there is reason to believe he is insane, the court should institute a preliminary proceeding, to ascertain his sanity. Yet this must be left to the sound discretion of the court, and if the prisoner pleads to the indictment, the omission of the court to institute the preliminary inquiry cannot be assigned as error, though from the facts as set out in the record, there may be strong grounds for the belief, that the prisoner was insane at the time of the trial. *Ib.* 153
3. Though the opinions of medical men, are entitled to more weight on the trial of a cause involving the question of sanity, than that of those who are

INSANITY—CONTINUED.

not physicians, yet it is the duty of the jury to weigh the whole evidence, and if satisfied that the testator was sane, should so find, although the medical men examined were of a different opinion. *Watson v. Anderson*, 202

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. When the sureties of a constable, suffer him to act under a bond to which their names have been signed, without objection, the jury is authorized to infer a waiver by them of any previous demand of additional sureties, before it was to be binding on them, and their consent to be bound by it as it stands. *May, et al. v. Robertson*, 86
2. When, upon the purchase of a plantation and slaves, on credit, a number of notes are executed, falling due during a series of years, if the maker discharges, or pays the notes first falling due, to the payee, he will be presumed to have availed himself of any payment, or off set, which then existed, and will not be permitted to make such a defence against an assignee of notes subsequently falling due. *Nelson & Hatch v. Dunn*, 259

INTEREST.

1. Interest upon general legacies, is not demandable until eighteen months after the grant of letters testamentary. The statute rate of interest furnishes the proper rule. *Hallett and Walker, Ex'rs, &c. v. Allen, &c.* 554
2. The right of a married woman to recover interest upon a general legacy, is not affected by the fact that no trustee had been appointed to act for her; especially in a case where the executors had determined not to pay legacies, until the estate could be made available without a sacrifice. *Ib.* 554
3. Interest cannot be computed on the damages. *Murphy & Brock v. Andrews & Bros.* 708
4. When the judgment of another State, is by the terms of the judgment, to carry interest at a given rate, from a specified time, the interest may be recovered in this State, without showing that by the statute law of the State in which the judgment was rendered, judgments carry interest. *Hudson v. Daily*, 722

JUDGMENT AND DECREE.

1. A reference to the master, to ascertain the sum which by the decree is ordered to be paid to the complainant, does not render it interlocutory, when the principles are settled by the chancellor by which the amount is to be ascertained. *McKinley v. Irvine, et al.* 681

JUSTICE OF THE PEACE.

1. A justice of the peace cannot be permitted to prove the contents of pa-

JUSTICE OF THE PEACE—CONTINUED.

pers, or the proceedings had before him in his office, and which were reduced to writing, without showing first the loss, or destruction of the higher evidence. *Bullock v. Ogburn, use, &c.* 346

LANDLORD AND TENANT.

1. The *lien* of a landlord, upon the goods of his tenant, where an execution or attachment is levied upon them, is confined to the rent due at the time of the levy; and although the goods are permitted by the officer to remain upon the premises until rent is due, they are in the custody of the law, and the *lien* will not attach. *Denham & Warford v. Harris,* 465
2. The *lien* of the landlord, is not impaired, by his taking from the tenant a note with surety for the payment of the rent. *Ib.* 465

LEGACY.

1. A legacy payable when the legatee becomes of age, if it can then be paid without a sale of the property, and if not, then to be postponed until the youngest child comes of age, cannot be coerced from the executrix, without establishing, that the legacy may be paid, without a sale of the property of the estate. *Casly, et ux. v. Gilder, Ex'r,* 322
2. Interest upon general legacies, is not demandable until eighteen months after the grant of letters testamentary. The statute rate of interest furnishes the proper rule. *Hallett & Walker, Ex'rs, &c. v. Allen, &c.* 554
3. The right of a married woman to recover interest upon a general legacy, is not affected by the fact that no trustee had been appointed to act for her; especially in a case where the executors had determined not to pay legacies, until the estate could be made available without a sacrifice. *Ib.* 554

LIEN.

1. A judgment against a female *dum sola*, but no execution issued thereon until after her marriage, creates no lien whatever on her property, and constitutes no impediment to the levy of an execution on the property, upon a judgment obtained against the husband and wife. *Haygood v. Harris,* 65
2. Where a creditor, by *scire facias*, seeks to subject lands to the payment of a judgment rendered against the intestate in his lifetime, a plea *puis darrein continuance*, that since the issuance of the *sci. fa.* the estate has been declared insolvent, &c., is a good bar. *Burk's Adm'r v. Jones & Allen,* 167
3. An innocent purchaser of land, affected by a judgment lien, has an equitable right, to be paid for improvements made upon the land. *Br. Bank at Montgomery v. Curry,* 304

See Bailor and Bailee, 1, 2.

See Landlord and Tenant, 1, 2.

See Partners and Partnership, 6, 7.

LIMITATIONS AND NON-CLAIM, STATUTES OF.

1. A surety received a promissory note from the principal debtor, as an indemnity, which he afterwards handed over to the creditor, as a collateral security, by whom suit was brought upon it; the creditor cannot recover upon the note, if the statute of limitations has effected a bar in favor of the surety upon the principal debt. *Russell v. Laroque & Hatch*, 149
2. If the note received by the surety as an indemnity, was handed to the creditor in payment of his liability, it would be no defence to the principal, when sued on the substituted note, that the statute of limitations had created a bar to the suit upon the original debt. *Ib.* 149
3. The possession of personal property, obtained by a fraudulent contract, with one indebted at the time, will not ripen into a title by force of the statute of limitations against the creditors of the vendor. *Powell v. Wragg & Stewart*, 161
4. If the instrument was valid, a bill could not be entertained to redeem the slaves fifteen years after the execution of the instrument. The parties having lived together in the State of Georgia, after the execution of the bond for the period of time prescribed by the statute of limitations of that State, to create a bar to a recovery at law, the title became perfect, and will protect the possession against a suit in this State, his possession having been adverse to that of complainant. *Freeman, adm'r v. Baldwin*, 246
5. A suit by the assignee of a bankrupt, must be brought within two years after the decree in bankruptcy, or after the cause of action accrues; and if this fact appears on the declaration, it will be reached by a demurrer — *Harris, Assignee, &c. v. Collins and Cartright*, 388
6. An action of detinue for a slave, is not barred by the statute of limitations of six years, unless the adverse possessor, has been within this State six entire years, so that he could have been sued in the courts of this State. — *Bohannon v. Chapman*, 641

MANDAMUS.

1. The refusal of a court, pending a motion against the sheriff, to permit him to amend his return, cannot be assigned as error in the judgment upon the motion. If the party is prejudiced by the refusal, the remedy is by mandamus. *Caskey, et al. v. Haviland, Risley & Co.* 314
2. A writ of error cannot be prosecuted on a judgment of the court refusing to quash, in the name of the deceased party, as defendant to the writ. The remedy, it seems, would be by an application to the supreme court for a mandamus. *Moore & Cocke v. Bell*, 469
3. *Mandamus* is the proper remedy to revise the action of an inferior court, in quashing, or refusing to quash an ancillary attachment. *Gee v. The Ala. L. Ins. & T. Co.* 579
4. The action of the primary court, in quashing, or refusing to quash, an attachment sued out as ancillary to the writ, cannot be inquired into upon a

MANDAMUS—CONTINUED.

- writ of error to the judgment. *Mandamus* is the proper remedy. *Hudson v. Daily*, 722
5. A mandamus will not lie when the party applying for it has no specific right, either legal or equitable. It will not lie to require a judge of the circuit court to declare an election void. *The State ex rel. Spence v. The Judge of 9th Judicial Circuit*, 806

MARRIAGE AND MARRIAGE SETTLEMENT.

1. A marriage had in Alabama, is not necessarily void, because the parties had been previously married, and divorced in the State of Georgia. Whether a prohibition in the sentence of divorce against the parties, or either of them marrying again, made in the State of Georgia, would render invalid a subsequent marriage of the same parties in Alabama, *quere*. *Reed v. Hudson*, 570
2. To render a marriage in Alabama invalid, it is necessary to show those facts, the existence of which deny to the parties the right, or capacity to intermarry, by the law of this State. *Ib.* 570
3. A marriage between a white man and a woman, who is of mixed white and Indian blood, if made between parties able and willing to contract, and consummated, is valid under the law of this state. *Quere*—When a marriage is duly solemnized in this state, does not the strength and perpetuity of the marriage tie depend upon the marriage *domicil*, and not upon any subsequent residence of the parties in a heathen country? *Wells v. Thompson*, 793
4. A marriage solemnized in this state, is not dissolved by an abandonment of one of the parties, unless sanctioned by a divorce in due form. *Ib.* 749

MASTER AND SERVANT.

1. Where the master would not be liable if he had cut the trees himself, he will not be liable for the acts of his servants obeying his instructions.—*Russell v. Irby*, 131

MORTGAGOR AND MORTGAGEE.

1. A deed by which F acknowledges himself indebted to B in the sum of \$1,600 with condition, "that if the above bound H F, does convey, and deliver, to said D B, his heirs, &c., a certain negro woman, Rachel, and her child, named Reuben, conveyed and sold to the said H F, by the said D B, when the said D B pays the said H F, five hundred and sixty-two dollars, then this bond to be void," &c., whether regarded as a mortgage, or conditional sale, in the absence of proof of fraud, mistake, or surprise, cannot be explained by parol proof. *Freeman, Adm'r, v. Baldwin*, 246
2. To enable the court to declare an absolute bill of sale to be but a security in the nature of a mortgage, the proof must be clear and convincing

MORTGAGOR AND MORTGAGEE—CONTINUED.

- Loose declarations of a trust, especially after great lapse of time, will not be allowed to overturn the written contract of the parties. *Ib.* 247
3. To make an absolute bill of sale, with a defeasance, operate as a mortgage, they must be executed at the same time. If the defeasance be executed afterwards, without consideration, it is a *nude pact*. *Ib.* 247

NON-SUIT.

1. An executor offering a will for probate, cannot take a non-suit. *Roberts v. Trawick*, 68
2. The refusal of a court to non-suit a plaintiff, because his recovery is less than \$50, is not a matter revisable on error. *Ainsworth v. Partillo*, 460

NOTICE.

1. At the time a bill of exchange was drawn, the drawer resided near Selma, where he had a plantation, and which was his nearest post office. That about two months before the maturity of the bill, he removed to Talladega county, with his family, some eighty miles distant, visiting his plantation occasionally, where his slaves remained; but there was no testimony, that the plaintiff, who resided in Mobile, knew of this removal, or of the residence of the drawer, further than might be inferred from his sending the notice to Selma. Held, that a notice of the dishonor of the bill, sent to him at Selma was sufficient, it not being shown that he had a fixed residence in Talladega. *Goodwin v. McCoy*, 271
2. It is not necessary, in a notice to a sheriff, that a motion will be made against him for a neglect of duty, to alledge that his official character continued, up to the time when a *feri facias* placed in his hands was returnable. *Casky, et al. v. Haviland, Risley & Co.* 314
3. A notice of the dishonor and protest of a bill of exchange, which describes it correctly, but is silent as to the date and time of payment, is *prima facie* sufficient. The interpretation of such a paper is the province of the court, and should not be referred to the jury. *Saltmarsh v. Tuthill*, 390
- See Ejectment, 2.

NUISANCE.

1. The action of the common council of the city of Montgomery, declaring a house in the city, from its dilapidated condition, endangering the lives of passers by, a nuisance, is *prima facie* evidence of the fact, casting on the party complaining of the act of the city, directing the rasure of the house, the burthen of proving it was not a nuisance. *City Council of Montgomery v. Hutchinson and Scott*, 573

OCCUPANT.

1. Under the act of 1836, "for the relief of tenants in possession against dormant titles," to entitle the tenant to compensation for permanent and valu

OCCUPANT—CONTINUED.

able improvements, it is sufficient that his occupancy was *bona fide*, under color of title. And for the purpose of showing that his occupancy was adverse, he may prove by parol, that it was the intention of the plaintiff to sell, and of the defendant to purchase the land in controversy, though by mistake omitted in the deed. *Lamar v. Minter*, 31

ORPHANS' COURT.

1. Objection cannot be made in the appellate court, to the allowance made to an executor, unless taken in the orphans' court, and the facts set out in the record. *Watson, et al. Legatees, v. McClanahan, Ex'r*, 57
2. An executor is entitled to a credit for payments made to a creditor of a legatee, by his direction. *Ib.* 57
3. The orphans' court has no power to allow an administrator to apply the share of a distributee, to debts he claims to be due him from such distributee, unless the distributee consents to it. *Kidd v. Porter, Adm'r*, 91
4. Although the orphans' court may have taken jurisdiction of the settlement of an estate, yet if there are assets in the hands of the administrator not administered, and the settlement in the orphans' court, though it purports to be final, remains to be completed as to the various sums left in the hands of the executor, chancery may take jurisdiction. *Dement, et al. v. the Adm'rs of Boggess*, 140
5. When the creditors of an insolvent estate, fail to nominate to the court an individual as a fit person to be appointed administrator, the court may appoint one. *Long v. Easley*, 239
6. An administrator of an insolvent estate, appointed since the passage of the act of 1843, may call on the administrator in chief, in the orphans' court, to account for the assets in his hands, and if he obtains a decree, may sue out execution upon it, notwithstanding the administrator in chief was appointed, previous to the passage of the act of 1843. *Ib.* 239
7. In a proceeding by the administrator *de bonis non* of an insolvent estate, against the administrator in chief, who had been removed, to obtain the assets in his hands, it is not necessary to make the heirs, or distributees parties. *Ib.* 239
8. No objection can be taken in the appellate court, for the allowance, or rejection of any item of the account, or for the failure to allow commissions, unless an exceptive allegation be filed in the orphans' court, showing the ground of admission, or rejection. *Ib.* 239
9. Partial settlements made by an administrator, are not *res adjudicata*; either party may, upon final settlement, show an error in the accounts, and the court may examine all matters of debit and credit, from the time the administration commenced, and render such decree as may be proper, upon a view of all the facts. *Smith's Heirs v. Smith's Adm'r*, 329

ORPHANS' COURT—CONTINUED.

10. If an administrator receives money or property, to which he is not entitled in his representative character, although he cannot hold it against the party entitled to it, yet the orphans' court cannot take it into the account, and render a decree against him therefor, on the settlement. *Ib.* 329
11. The orphans' court cannot confer authority upon an administrator, to receive the rent of lands situate in another state, and if he does receive it, he cannot be required to account for it as administrator, unless it be shown that it was received *virtute officii*. *Ib.* 329
12. One executor, who is also a creditor of the estate he represents, may file his petition in the orphans' court, and compel a settlement and distribution of the estate, his co-executor having assets for which he fails to account. *King v. Shackelford,* 435
13. There is no statute in this State authorizing the transfer of a cause from the orphans' court to the circuit court, and an order making such transfer is a nullity; and if the orphans' court, influenced by such order, repudiates the jurisdiction of the cause, and dismisses it, the judgment is erroneous. *Ib.* 435
14. An affidavit made to an account, filed against an insolvent estate, does not establish its correctness; but if required, the creditor must prove it by competent testimony. *Brasher and Gooch, Adm'rs, v. Lyle and House,* 524
15. The orphans' court has no power to authorize an executor to sell the dead victuals and liquors, laid in by the deceased for consumption in the family, and left at his death, or the property exempt by law from sale; and the widow may, notwithstanding such order, maintain trespass against the executor. The removal of a part of the children from the family, will not prevent the widow from recovering her share of the dead victuals. *Carter v. Hinkle,* 529
16. When the decree made by the orphans' court, gives to the widow the benefit of the advancements made to the children, and this fact appears in the decree itself, the error may be revised in the appellate court, without a formal exception to the action of the orphans' court. *Logan v. Logan, Adm'r,* 653
17. Administration being granted upon an estate in 1840, the administrator continued to act until 1847, making annual sales by order of the court, and in 1846 applied for an entry *nunc pro tunc*, authorizing him to keep the estate together, under the act of 1835. Held, that as there was no record evidence that the original order was to keep the estate together, and as all the inferences from the conduct of the administrator, in the administration, were, that he was acting under the general law, the court had no power to make such an order *nunc pro tunc*. *Benford v. Daniels,* 667
18. Although an administrator acting under a misapprehension, has incurred expenses in keeping up a farm, rearing the infant children, expending his own labor, &c. &c., he cannot be relieved in the orphans' court, but the

ORPHANS' COURT—CONTINUED.

- distributees may elect, whether they will take the profits of the business, or proceed against him for the rent of the land, and use of the personal property. Whether he could not have relief in another *forum, quere.* *Ib.* 668
19. Upon a writ of error sued out upon a final decree in the orphans' court, against an administrator, he cannot assign for error, that he had been improperly removed from the administration, by a previous decree of the court. *Price v. Simmons, Adm'r,* 749
20. An erroneous judgment, and award of execution, in favor of an administrator *de bonis non*, against a removed administrator, made previous to the passage of the act of 4th February, 1846, authorizing such a decree to be rendered, is not cured by the passage of that act. *Ib.* 749

PARTNERS AND PARTNERSHIP.

1. One of two partners, who has made a usurious contract without the knowledge of his co-partner, is a competent witness for his co-partner, when sued upon a contract he had individually made with the creditor, in which the usurious contract is merged, the partner who is sued having released the other. *Jackson v. Jones,* 121
2. When a partnership is dissolved, and upon settlement a balance found due to one of the partners, assumpsit will lie for the amount. *Pope v. Randolph, Adm'r,* 214
3. A partner has no right, or share in the partnership property, until the partnership debts are paid, and each of the partners has the right to have the firm debts paid, before any of the partners, or their personal representatives, or any individual creditor of such partner, can claim any right or title thereto. Each partner has a *specific lien* on the partnership stock, not only for the amount of his share, but for all monies advanced by him, beyond that amount, for the use of the partnership; and each partner has the right to assert his equity in behalf of creditors. *Donelson's Adm'rs v. Posey, et al.* 752
4. An insolvent firm, will not be allowed to recover a debt from one who is liable to pay, and has paid a debt for the same firm. *Ib.* 752
5. In the absence of any special agreement between partners, for a division of the profits, and loss, the law implies that they were equally interested. *Ib.* 752
6. Partnership creditors, as such, have no *lien* on the partnership effects, until in the case of land, they have obtained a judgment, and in respect to personalty, have execution issued. The *lien* which the partners themselves have, in the partnership effects, for the payment of the partnership debts, may in some cases be made available in favor of creditors, by their being subrogated to the rights and equities of the partners themselves. *Reese & Heylin v. Bradford, et al.* 837
7. One partner, may sell and dispose of the effects of the firm to his co-

PARTNERS AND PARTNERSHIP—CONTINUED.

partner, and if the sale is fair, it will vest the exclusive title in the co-partner. If no *lien* is reserved by the retiring partner, none can be asserted by the creditors of the firm. *Ib.* 837

PAYMENT.

1. The note of a stranger, received by the plaintiff, in satisfaction of a judgment, will, if paid, be a satisfaction, though it be of less amount than the judgment. *Sanders v. Br. Bank at Decatur*, 353
See Assumpsit, 1.

PLEADING.

1. Where a creditor, by *scire facias*, seeks to subject lands to the payment of a judgment rendered against the intestate in his lifetime, a plea *puis darrein continuance*, that since the issuance of the *sci. fa.* the estate has been declared insolvent, &c. is a good bar. *Burk's Adm'r v. Jones & Allen*, 167
2. It is no answer to a declaration in case, for wrongfully and maliciously suing out an attachment, that the defendant had good reason to believe, and verily did believe, that the plaintiffs were about to dispose of their property fraudulently, with intent to avoid the payment of the debt sued for; and therefore a plea to this effect, setting out the facts upon which such belief was predicated, is bad on demurrer. *Donnell v. Jones, et al.* 490
3. An assignment of a breach, in a suit on a sheriff's bond, that lands of the defendant in execution, worth \$5,000, were unlawfully, and negligently sold by him, for \$303, to satisfy an execution of the plaintiff for \$234, besides costs, is bad on demurrer, there being no allegation, that the sale was made on other executions than that of the plaintiff, or that the money was absorbed by senior executions. *Powell v. The Governor*, 516
4. An assignment of a breach, which shows, that the money was received by the sheriff, at a time subsequent to the return term of the writ, as ascertained by law, is bad on demurrer. *Dean and Johnson v. The Governor*, 526
5. A plea alledging that a receipt, and satisfaction, was obtained by fraud in the sale of a horse, is bad, as it states a conclusion of law, instead of stating facts. *McKeagg v. Collehan*, 828

PRACTICE AT LAW.

1. Where the record discloses, that a judgment was once rendered in the cause, in favor of the defendant, and another trial is had, and a judgment rendered for the plaintiff, there being no plea of a former recovery, or objection made to the action of the court, the appellate court will presume, that a new trial was granted by the court, or consented to by the parties, and omitted to be entered by mistake. *McGehee, Adm'r, v. Hansell*, 17
2. When, in obedience to a *sci. fa.* one appears as administrator *de bonis*

PRACTICE AT LAW—CONTINUED.

- non*, by his attorney, and proceeds to trial, it will be presumed that he was the representative of the deceased, and was regularly made a party to the suit. *Ib.* 17
3. A variance between the cause of action indorsed on the writ, and the declaration, must be total, and amount to a radical departure, to authorize the court to reject the declaration. *Tenison v. Martin*, 21
4. Objection cannot be made in the appellate court, to the allowance made to an executor, unless taken in the orphans' court, and the facts set out in the record. *Watson, et al. Legatees, v. McClanahan, Ex'r*, 57
5. Evidence of the truth of the charge, in an action of slander, is not admissible under the general issue. *Douge v. Pearce*, 128
6. Upon issue joined on the plea of *non detinet*, it is not admissible to prove the determination of the plaintiff's interest, since the issue was joined. Such testimony is only admissible under a *plea puis darrein continuance*. Nor can the fact be given in evidence, to restrict the recovery of damages. *Brown v. Brown*, 208
7. It is the duty of the court to strike out a plea pleaded by its title, on the other party objecting to receive it, but if he demurs to it, he does not thereby admit that the name of a plea is a defence regularly interposed. *Barron, Adm'r, v. Vandvert, Adm'r*, 232
8. When a party has the benefit of a defence, under the plea of *non assumptit*, he cannot complain that a demurrer was improperly sustained to a special plea, setting up the same defence. *Ib.* 232
9. When a party under the general issue, has the benefit of a defence set up by a special plea, he cannot complain of error in sustaining a demurrer to such plea. *Goodwin v. McCoy*, 271
10. Where two judgments are rendered against a defaulting witness, for failing to attend as a witness, in a State cause, at different terms of the court, the proper remedy is, to move the court to vacate the last judgment, on producing the first, and upon the refusal of the court, a writ of error would lie to this court. *Ryan v. The State*, 514
11. It is error to dismiss a cause because security has not been given for the costs, pursuant to an order of the court, if the party is able, and willing to give the security, when the cause is called for trial. *Whitaker v. Sanford, et al.* 522
12. One or more of several wrong doers, against whom nothing is proved, may be acquitted, and examined as a witness for his co-defendants; but where the least evidence is given against one of several wrong doers, who is sued jointly, he cannot be discharged on the trial, for the purpose of being examined as a witness. *Harris v. Mauldin, et als.* 674
13. It is within the discretion of the court, to receive, or reject testimony, when offered out of the usual course of procedure, and cannot be revised on error. *Ivey v. Phifer*, 821

PRACTICE IN CHANCERY.

1. When a cause is submitted for trial on bill and answer, and the defendant denies the equity of the bill, and avers that the same was filed for delay, damages of six per centum, upon the judgment at law enjoined by the bill may be decreed. *Weissinger, et al. v. Johnson, et al.* 93
2. The chancellor may entertain a motion to dissolve an injunction, notwithstanding exceptions have been filed to the answer, which are not disposed of. But the defendant should have the benefit of all exceptions well taken, and the case should be considered as if they were sustained. *Barney v. Earle, et al.* 106
3. Impertinent matter, which if stricken out would not affect the merits of the case, cannot be considered upon the inquiry, whether the chancellor properly dissolved the injunction. *Ib.* 106
4. Though the bill does not alledge the precise time when the letters testamentary were granted, the complainant may prove it under the general allegation. *Hallett and Walker, Ex'rs, v. Allen,* 555
5. An allegation in a bill, by which the complainant deduced his title to three shares of stock, in an unincorporated company, averring that the shares were purchased by one H, principally with the means of one J M, to whom the certificates of the stock were delivered, and a power of attorney executed to one B, by H, to transfer the title to J M, but which was not done. That J M departed this life, and B and H executed a power of attorney to J T M, to make such title to said shares of stock, as was in them. That the complainant became the purchaser of said shares of stock from J T M, and his brother, J H M, the heirs and distributees of the said J M, who for themselves, and the said J T M, as attorney for H and B, by deed conveyed to complainant, said three shares of stock, is not sustained by proof, that J T M, and J H M, were entitled to the stock as the devisees of their father, J M, and not as his heirs, the title being put in issue. *McKinley v. Irvine, et al.* 681
6. To authorize the proof of documents at the hearing, *viva voce*, reasonable notice must be given that such proof will be offered. *Ib.* 682
7. It is too late to amend a bill, after proof taken on both sides, and the cause finally heard, when the amendment would put in issue a different title from the one previously asserted. The rule, it seems, is different in respect to parties, or mere clerical mistakes. *Ib.* 682

PRINCIPAL AND AGENT.

1. When power is given to an agent to sell a slave, an authority is implied to make to the purchaser a warranty of title and soundness. *Cocke v. Campbell & Smith,* 286
2. An agent authorized by parol to sell a slave, cannot execute a warranty of soundness under seal, so as to bind his principal upon the warranty as his deed; but such a warranty, though under seal, is evidence, as an ad-

PRINCIPAL AND AGENT—CONTINUED.

- mission of the agent, at the time of the sale, of the terms of the contract.
Ib. 286
3. When an agent is instructed not to sell a horse for less than \$500, and he notwithstanding sells for a less sum, in an action by the owner against the agent, the measure of damages is not the difference between the price placed on the animal by the owner, and the sum for which it was sold, but the actual injury sustained by the breach of the instructions. *Ainsworth v. Partillo*, 460
4. When an agent instructed to sell a horse, exchanges it for another, the act is a conversion, and the agent becomes liable to the owner, for the value of the animal, without a demand. *Ib.* 460
5. Admissions of an agent, to be binding on the principal, must be made at the time of doing some act in the execution of his authority, in respect to the property, with which he is entrusted as agent. *Bohannon v. Chapman*, 641
6. When an agent sells land in the name of his principal, without authority to bind the principal, and the principal on being informed of the sale refuses to ratify and confirm it, the vendee may abandon the land, and the principal cannot, by afterwards offering to confirm it, enforce the contract. *Wilkinson, et al. v. Harwell*, 660
7. An agent appointed by the trustees of an unincorporated land company, to bring its affairs to a close—to receive all monies due from, and to adjust, settle, and compromise with the debtors of the company—and having authority to receive the stock of the company at \$475 a share, in the final settlement with the purchasers of lots, and lands of the company—cannot purchase in the stock of the company for his own use; but such purchase will be regarded as being made on behalf of his principals. *McKinley v. Irvine, et al.* 682
8. After such agency had ceased, he might become the owner of stock in the company, but could not thereby entitle himself to retain in his hands money which he had collected as agent, and attorney at law for his principals, unless insolvency, or some independent ground of equitable interposition exists. The non-residence of the trustees, is no ground for the interference of chancery, that fact being known to the agent, at, and previous to his purchase of the stock. *Ib.* 682

PRINCIPAL AND SURETY.

1. When the sureties of a constable, suffer him to act under a bond to which their names have been signed, without objection, the jury is authorized to infer a waiver by them of any previous demand of additional sureties, before it was to be binding on them, and their consent to be bound by it as it stands. *May, et al. v. Robertson*, 86
2. A surety received a promissory note from the principal debtor, as an in-

PRINCIPAL AND SURETY—CONTINUED.

- demnity, which he afterwards handed over to the creditor, as a collateral security, by whom suit was brought upon it: the creditor cannot recover upon the note, if the statute of limitations has effected a bar in favor of the surety upon the principal debt. *Russell v. Laroque & Hatch*, 149
3. If the note received by the surety as an indemnity, was handed to the creditor in payment of his liability, it would be no defence to the principal, when sued on the substituted note, that the statute of limitations had created a bar to the suit upon the original debt. *Ib.* 149
4. When a contract for the sale of land is rescinded by the decree of a court of chancery, the surety of the vendee is not responsible for the value of the use and occupation of the land by the vendee, the surety never having been in possession, or derived any benefit from it. *Elliott, et al. v. Boaz, et al.* 535
6. A note signed by one as surety, on condition that another person also signs it as surety, and left with the payee for that purpose, cannot be enforced against the surety, unless executed also by the person indicated as co-surety. *Jordan, et al. v. Loftin, et al.* 547
6. A surety when sued, may, with the consent of his principal, set off a debt due from the plaintiff to his principal. *Lynch v. Bragg*, 773

PRE-EMPTION LAW.

1. M being entitled under the law of congress to a pre-emption on a certain quarter section of the public land, agrees with T to abandon his claim and permit M T to take possession and make improvements, so as to entitle the latter to a pre-emption, and in consideration of an amount agreed to be paid him, does abandon his claim, and proves a pre-emption for M T—Held, that in an action by M against T for the price of his claim, the contract was void, and could not be upheld. *Tenison v. Martin*, 21
2. When the register and receiver of the land office determines a controversy between two individuals, claiming the right to enter land under the pre-emption law, and on appeal to the secretary of the treasury he affirms their decision, a court of law cannot review the decision, which is final between the parties. Whether a party would be entitled to relief, either in equity or at law, when a decision has been procured against him by fraud *quere?* *Mitchell v. Cobb*, 137

PROCESS, AND SERVICE OF.

1. The forms of returns to be made to process, as prescribed by statute, are not exclusive of all others, expressing the same meaning. A return of a sheriff to an execution, which states a levy and sale of certain lands, and the appropriation of the proceeds to older executions, but which does not affirm that the defendant had no other property from which the residue of

PROCESS—SERVICE OF—CONTINUED.

1. A return can be satisfied, is substantially defective. *Casky, et al. v. Haviland, Risley & Co.* 314
2. It is not the duty of the sheriff to return the execution to any one but the clerk or his deputies; but must use all reasonable diligence, to make a due return to the clerk. *Ib.* 314
3. A return of satisfaction, upon an execution made by the sheriff, by the directions of the plaintiff's agent, prevents the plaintiff from issuing another execution, upon the judgment, whilst the return continues in force, and discharges the *lien* of the execution, as against a purchaser from the defendant in execution, who bought *prior* to the return being made. *Br. Bank of Mobile v. Ford,* 431

RECEIPT.

1. A receipt is open to explanation, and if fraudulently obtained, in discharge of an execution, or is without consideration, it will oppose no obstacle to a recovery. *McKeagg v. Collehan,* 828

RECORD AND JUDGMENT ROLL.

1. A record of a judgment properly certified, is evidence of the fact that such a judgment exists, against strangers as well as parties and privies. *Havis v. Taylor,* 324
2. A certificate designed to certify a record of another State, which recites, "I, A. K., *first* justice of the county court of M., in the State of Virginia, do hereby certify," &c. is not sufficient under the act of Congress, at least without proof, that by the law of that State, the *first*, or oldest justice of the court, was the chief justice, or presiding magistrate. *Hudson v. Dailly,* 723

RECOUPMENT.

1. Pursuant to a contract, between the plaintiffs, and defendant, the latter deposited his cotton in the warehouse of the former, where it was destroyed by fire. The former, having brought an action against the latter, to recover for advances made on the deposit of the cotton—held, that if the defendant could recover damages from the plaintiffs, for the loss sustained in the destruction of the cotton, he could *recoup* such damages in this action. *Hatchett & Bro. v. Gibson,* 587
2. The object of the defendant being to *recoup* the damages, it was competent for him, when sued for the advance, to prove the destruction of his cotton by fire, and the manner in which it occurred. *Ib.* 587

REDEMPTION LAW.

1. A creditor, who obtains a judgment, after a sale of the debtor's land under judgment and execution against him, and before the expiration of the time allowed by the statute for redemption, may redeem the land from the first purchaser. *Pollard v. Taylor,* 604

RELEASE.

1. A release obtained by fraud is void. *Turnipseed v. McMath*, 44
See Evidence, 5.

SALES.

1. A sale of land by one person, is not void at common law, because an action is then pending against the vendor. *Camp v. Forrest, et al.* 114

SALES UNDER JUDICIAL PROCESS.

1. When a party whose land has been sold under execution, delays more than four years, before he makes application to set it aside, during a large portion of which period he has been engaged in litigating the title, with the purchaser, a much stronger case will be required to warrant the interference of the court, than if a prompt application had been made. *McCullum v. Hubbert and Caple*, 289
2. A sheriff having executions in his hands, made a levy on land, and went out of office without making sale of it. The execution on which the levy was made coming to the hands of his successor after his qualification, he struck the name of his predecessor out of the levies, and inserted his own, altering the date to correspond with his reception of the execution, and sold under this levy. Held, that the sale was not affected by the previous levy of his predecessor. *Ib.* 290
3. A fraud which will justify the court on motion, to set aside a sheriff's sale of land, must exist at the time of the sale. Subsequent irregularities will not have that effect, but the party will be remitted to his rights in another forum. *Ib.* 290
4. A purchaser who has made full payment, entered into and retained the possession of land, but who has no other evidence of title, than a bond conditioned to make him a conveyance in due form, has not such a title as can be sold under execution at law. Nor will the purchaser at the sale, with the sheriff's deed, acquire such a title that he can maintain an action at law to recover the possession. *Elmore & Willis v. Harris*, 360
See Sheriff and his Sureties, 3, 4.

SCIRE FACIAS.

1. Where a creditor, by *scire facias*, seeks to subject lands to the payment of a judgment rendered against the intestate in his lifetime, a plea *puis darrein continuance*, that since the issuance of the *sci. fa.* the estate has been declared insolvent, &c., is a good bar. *Burk's Adm'r v. Jones & Allen*, 167
2. The lien of a judgment upon the real estate of a deceased debtor, is destroyed by his death, and upon the declaration of the insolvency of the estate, before judgment on *scire facias*, subjecting the land, the estate vests in the administrator, for the purpose of paying all the debts *pro rata*. *Ib.* 167

SET OFF.

1. The plaintiff and defendant being joint owners of a horse, the former sold the horse for a note on M, for \$30, payable to himself, and a mare worth \$70 or \$80. The defendant afterwards purchased the interest of the plaintiff in the mare, and gave his note for the price. M was solvent, and able and willing to pay the note of \$30, which the plaintiff claimed as his own. Held, that in a suit upon this note, the defendant might set off his interest in the \$30 note, if it had not been included in the settlement between the parties. *Dill v. Phillips*, 350
 2. One to whom money is paid by mistake, may, when suit is brought to recover it back, offset any claim he has against the person so paying it.—*Hall v. Chenault*, 710
 3. An administrator, who has made a final settlement, and who has been charged with the amount of a note due his intestate, may, when sued by the maker of the note, offset the amount due upon it. *Ib.* 710
 4. The equitable right of a party to a set off, cannot be defeated by a transfer of the debt to a trustee. *Donelson's Adm'r v. Posey, et al.* 752
 5. A surety when sued, may, with the consent of his principal, set off a debt due from the plaintiff to his principal. *Lynch v. Bragg*, 773
- See Bills of Exchange and Promissory Notes, 2, 3.

SHERIFF AND HIS SURETIES.

1. When the declarations of a sheriff constitute a part of his acts, they are admissible as a part of the *res gestae* against his sureties. *Casky, et al. v. Haviland, Risley & Co.* 314
2. It is not necessary in a motion against the sheriff and his sureties for neglect of duty of the former, that the jury should be satisfied beyond a reasonable doubt, that the plaintiff's case, or the defence has been made out. All that is necessary is, that there should be such a preponderance of proof as will convince the judgment, by the application of the ordinary tests of truth. *Ib.* 314
3. An assignment of a breach in a suit on a sheriff's bond, that lands of the defendant in execution, worth \$5,000, were unlawfully and negligently sold by him for \$303, to satisfy an execution of the plaintiff for \$234, besides costs, is bad on demurrer, there being no allegation that the sale was made on other executions than that of the plaintiff, or that the money was absorbed by senior executions. *Powell v. The Governor, use, &c.* 516
4. When a sale is fairly conducted by the sheriff, mere inadequacy of price is not sufficient to subject him to damages. To render him liable, there must be either fraud, or gross neglect in the performance of his duty, causing injury to the plaintiff, or defendant in execution. Whether a sale at a grossly inadequate price might not, with other circumstances, be evidence of fraud, *quere?* *Ib.* 516

SHERIFF AND HIS SURETIES—CONTINUED.

5. No suit can be maintained against a sheriff on his official bond, for money received by him on an execution after the return day is past, though he would be individually liable for the money so received. *Dean and Johnson v. The Governor, &c.* 526
6. An assignment of a breach, which shows, that the money was received by the sheriff, at a time subsequent to the return term of the writ, as ascertained by law, is bad on demurrer. *Ib.* 526
7. An admission by the sheriff, after the expiration of his term of office, that he had collected the money upon an execution, is not evidence of the fact against his sureties. *Evans, et al. v. The State Bank,* 787
8. It is not necessary that the plaintiff should proceed at the next term after demand made of the sheriff, to entitle him to recover of the sureties, five per cent. per month from the time of the demand. *Ib.* 787
See Assumpsit, 1.

SLANDER.

1. Evidence of the truth of the charge, in an action of slander, is not admissible under the general issue. *Douge v. Pearce,* 128
2. It is not indispensable that a witness for the plaintiff should give the exact language used by the defendant, showing the slanderous words had reference to a trial. If this was considered desirable, he should, upon the cross examination, elicit the precise language used. *Ib.* 128
3. In an action for slandering the title of another's property, the slanderous words must be set out in the declaration. Where the injury was alledged to consist, in asserting title to a slave, sold under execution as the property of the plaintiff, it was necessary to alledge what the defendant said, what title he set up, and that the words were spoken in the hearing of the bidders. *Hill v. Ward,* 310
4. The defendant in such an action, to rebut the presumption of malice, may prove, that upon a fair representation of his claim, he was advised by a lawyer to forbid the sale of the slave, to render his claim under a mortgage of the slave effectual. *Ib.* 310
5. Although the title which the defendant asserted was invalid, if asserted in good faith, without malice, no recovery can be had against him. *Ib.* 311

SLAVES.

1. A testator by his will declared, that certain of his slaves should be permitted to go to Africa, their passage to be paid, &c., but if they desired to remain subject to his daughter as they had been to him, they should be permitted to do so, but in no event to be sold, or deprived of this privilege either before or after the death of my said daughter. Should they, or any, or all, prefer not to emigrate, then, and in that event, they shall in all respects be subject to my daughter, as they are to me—Held, that the slaves

SLAVES—CONTINUED.

had not the legal capacity to choose between freedom and servitude, and that the bequest of freedom being void, the title to the slaves was vested in the daughter. *Carroll and Wife v. Brumby, Adm'r*, 102

STATUTES.

1. On the 13th March, 1845, the Intendant and Council of Greensboro' passed an ordinance, authorizing any person who had obtained a license from the county court to retail spiritous liquors in the town of Greensboro', upon paying \$100 and taking out a town license; the penalty for infringing this ordinance was \$20. On the 8th May, 1845, an ordinance was passed, requiring all licensed retailers in the corporation to pay a tax of \$10. The defendants were licensed by the county court, in July, 1844, and August 1845, and in September, 1845, retailed spiritous liquors in the town, without taking out a license under the ordinance of March. In an action to recover the penalty—Held, that the meaning of the two ordinances, taken together, was, that the ordinance of May imposed a tax as an additional charge, without reference to the time when the party was licensed by the county court. *Intendant and Council of Greensboro' v. Mullins and Barfield*, 341

SUMMARY PROCEEDINGS.

1. If the defendant in a summary proceeding, appears and makes no objection to the court then proceeding to entertain the motion, he cannot object on error, that the notice was for a judgment at the preceding term of the court, and that no action, by continuance or otherwise, was then had upon it. *Evans, et al. v. The State Bank*, 787
2. It is not necessary that the plaintiff should proceed at the next term after demand made of the sheriff, to entitle him to recover of the sureties, five per cent. per month from the time of the demand. *Ib.* 787

SUNDAY.

See Bills of Exchange and Promissory Notes, 10.

TIMBER TREES.

1. The act imposing a penalty, for cutting down, carrying away, or destroying cypress, and other timber trees, without the consent of the owner, does not extend to a case, where by mistake the party goes beyond his own boundary, and is under the impression that he is cutting on his own lands, though he would be liable at common law. Whether negligence so gross, as to indicate an entire recklessness, or indifference to the rights of another, would be a substitute for actual knowledge, or authorize its implication, *quere.* *Russell v. Irby*, 131
2. Where the master would not be liable if he had cut the trees himself, he will not be liable for the acts of his servants obeying his instructions.—*Ib.* 131

TROVER AND CONVERSION.

1. Possession is sufficient evidence of title, in trover, or detinue, against a wrong doer. *Phillips v. McGrew*, 255
2. Possession of a note, is *prima facie* evidence of ownership, in an action of trover by him, against one who shows no title to it. *Donnell v. Thompson*, 440
3. The collection of a note, by one not entitled to it, is evidence of a conversion, and renders a demand unnecessary. *Ib.* 440

TRUST.

1. Parol evidence is admissible to show, that a deed, or bill of sale, absolute on its face, was intended as a mortgage, or that it was executed and delivered upon certain trusts, not reduced to writing, and upon the proof being made, a court of equity will decree their execution. *R. Bishop's Heirs v. The Adm'r and Heirs of S. Bishop*, 475
2. A court will not declare a deed absolute on its face, to be conditional, or upon a trust, but upon strong and stringent proof, and will pay but little attention to the casual remarks of men about their property; but when the trust is clearly made out, will execute it. *Ib.* 475
3. The complainants having alledged two trusts, first, that the trustee was to hold certain slaves for the use of the complainants, for a fixed period, and then to convey them; the last mentioned trust being proved, should be enforced, though the complainants failed to prove a trust in their favor before that time. *Ib.* 475
4. A testator by his will directed as follows: "It is my will, that the interest which I have in a house and lot, in the town of Huntsville, with all my lots lying in the towns of Triana, and Florence, be sold, and the proceeds applied to the payment of legacies hereafter bequeathed, and the discharge of my debts. I hereby direct, and require my executors, hereinafter named, to keep my estate in the county of Marengo together, until all my debts and legacies are paid off and discharged, and out of the proceeds of my said estate in Marengo, to pay annually to my beloved wife, Sophia, one thousand dollars for her support," &c. By another clause in his will, the testator declared that his estate in Marengo should not be divided, until his debts, and the legacies were paid. Held, that the will did not create a trust by implication in favor of creditors, which would take a debt due by the deceased out of the statute of limitations, or prevent it from running, or prevent the bar of the statute of *non-claim*. *Carrington & Co. v. Manning's Heirs*, 611
See Trustee and Cestui Que Trust, 2, 3, 4.

TRUSTEE AND CESTUI QUE TRUST.

1. After the law day has passed, if the demand secured by the deed has not been satisfied, the trustee may recover by suit the property conveyed by the deed, which has not been disposed of according to the requisitions of

TRUSTEE AND CESTUI QUE TRUST—CONTINUED.

- the trust, without being required, in a proceeding at law, to account for the property sold, or for that which remains, if the deed is satisfied, it devolves on the other party. *Eden*, 371
2. Though a trustee cannot profit by the purchase of the trust property, the objection can only be raised by the persons interested. *McKinley v. Irvine, et al.* 682
 3. Expenses incurred by trustees in the erection of a tavern, and public county buildings, though made in good faith, and though they tended greatly to enhance the value of the town lots, cannot be allowed as a credit to the trustees in their account, unless such expenditures were authorized by the authority under which they acted, or the shareholders expressly, or impliedly, consented to the outlay. *Ib.* 682
 4. All the trustees of a private land company, who have participated in the execution of the trust, or their personal representatives if they be dead, should be parties to a bill filed by a stockholder, for the settlement of the trust estate. *Ib.* 682
 5. An allowance to a trustee, of twelve and a half per cent., by the terms of the deed, will not render it void, in the absence of proof that it was unconscientious. *Donelson's Adm'rs v. Posey, et al.* 752
- See Principal and Agent, 7, 8.

USE AND OCCUPATION.

1. When a contract for the sale of land is rescinded by the decree of a court of chancery, the surety of the vendee is not responsible for the value of the use and occupation of the land by the vendee, the surety never having been in possession, or derived any benefit from it. *Elliott, et al. v. Boaz, et al.* 535

USURY.

1. The testatrix, by a writing under seal, acknowledged that she had received from the executor, the sum of two hundred dollars, and promised to pay it, if convenient, during her life, but if she should fail to pay it, she directs her executors, on the death of herself, and her brother John, to pay the same, with the addition of twenty *per cent. per annum*. By her will, she recites this promise, and directs it "to be paid according to its terms." Held, that the executor could retain this money, with interest at the rate of twenty *per cent. per annum*, to the time when, from the condition of the estate, the executor was enabled to realize the money, as against a legatee; whether he could as against creditors, receive interest at the rate of twenty *per cent. per annum*, *quere?* *Watson, et al. Legatees, v. McClanahan, Ex'r,* 57
2. One of two partners, who has made a usurious contract without the knowledge of his co-partner, is a competent witness for his co-partner, when sued upon a contract he had individually made with the creditor, in which

USURY—CONTINUED.

- the usurious contract is merged, the partner who is sued having released the other. *Jackson v.* 121
3. When notes are executed, charging usury, interest, if afterwards new notes are executed, and all interest is paid on the old notes, and carried into the new, it would render the new notes usurious, and under the statute, void as to the interest. *Ib.* 121
4. The borrower is a competent witness under the statute, to testify to the fact of usury; but he cannot give evidence of a distinct and independent fact, and then prove the usury by other witnesses. *Ib.* 121
2. P lent D a sum of money, taking his note for the payment; at the same time a parol agreement was entered into by the parties, that the borrower should pay the State tax on the loan, which was one fourth of one per cent. Held, that P was entitled to recover eight per cent. on the loan, and that the contract was not on its face usurious. *Dubose v. Parker*, 779

VARIANCE.

1. A variance between an execution and the judgment to enforce which it was issued, does not render the execution a nullity, as it may be amended so as to conform to the judgment. *McCollum v. Hubbert and Caple*, 282

VENDOR AND VENDEE.

1. A vendee, holding only a bond for title, cannot resist a recovery at law, when the vendor sues to recover the possession. His remedy is in equity to file a bill to redeem. A purchaser from the vendee, without notice, is in no better condition, as it was his duty to inquire into the nature of the title he was purchasing. Notice to quit previous to the institution of the suit, is not necessary. *Chapman v. Glassell*, 50
2. It is no obstacle to the maintenance of an action at law, by the vendor, to recover the possession, that he is prosecuting a suit in chancery to foreclose his equitable mortgage. *Ib.* 50
3. A sale of land by one in possession, is not void at common law, because an action is then pending for the land against the vendor. *Camp v. Forrest, et al.* 114
4. A bond conditioned to make title to land, on the payment of the purchase money, is an equity merely in the vendee, which cannot be sold by execution at law against him. *Driver v. Clark & Givens*, 192
5. In such a case, a bill may be filed by the vendor, against the vendee, to enforce the equitable lien, for the payment of the purchase money, without making the purchaser of the interest of the vendee at sheriff's sale a party, though he is in possession of the land, unless it be shown that he is connected with the equitable title sought to be foreclosed. *Ib.* 192
6. When a fraud has been committed upon a vendee in the sale of land, by the false representation of the vendor, that he had title, when he had none, the vendee may resort to chancery for a rescission of the contract, and a return of the purchase money paid, against the representatives of the ven-

VENDOR AND VENDEE—CONTINUED.

- dor, without a delivery of the possession, the vendor having died insolvent. *Greenlee v. Gaines*, 198
7. An innocent purchaser of land, affected by a judgment lien, has an equitable right, to be paid for improvements made upon the land. *Br. Bank at Montgomery v. Curry*, 304
8. When an agent sells land in the name of his principal, without authority to bind the principal, and the principal on being informed of the sale refuses to ratify and confirm it, the vendee may abandon the land, and the principal cannot, by afterwards offering to confirm it, enforce the contract. *Wilkinson, et al. v. Harwell*, 660
9. S & M, holding the patent of the government, sold the land to W C, taking his notes for the purchase money, executing to him a bond for title, when the purchase money was paid. W C put his brother, William C, in possession, who paid the first note, and judgment being obtained on the second, by an arrangement between the parties, the judgment was discharged by D, who, by the consent of William C, received an assignment of the bond from Wright C. Subsequent to this, William C filed a bill in chancery against D, to obtain title to the land, after which D surrendered the title bond to S & M, and took from them a conveyance of the land. Held, that the possession of William C, he having produced no written evidence of title, was not such an adverse possession as would invalidate the conveyance to D. That the pendency of the suit in chancery interposed no obstacle, and that the title of the defendant being purely equitable, could not be set up in a court of law, against the legal title. *Cawsey v. Driver*, 818

WAREHOUSE AND WAREHOUSEMEN.

1. Warehousemen, are bound to take reasonable, and common care, of any commodity entrusted to their charge; and if a loss occurs under circumstances which shows the want of such care, they are bound to make it good. *Hatchett & Bro. v. Gibson*, 587
2. To determine whether a warehouse was fire-proof, a witness may describe his own warehouse, and show how the plaintiffs' was built. *Ib.* 588
3. Proof of the rate of insurance, in the warehouse of the plaintiffs, and that of T, and the practice of planters and merchants in insuring in either warehouse, is inadmissible. *Ib.* 588
4. To prove that the warehouse was to be fire-proof, the advertisement of the plaintiffs, and their receipts, as well as their declaration to the defendant, after he had begun to store his cotton, were admissible evidence.—*Ib.* 588
5. If it was a term of the contract, that the defendant's cotton was to be stored in a fire-proof warehouse, and the cotton was lost by the failure to provide such a house, the plaintiffs must make good the injury. The fact that the defendant was in the warehouse, after he had begun to deliver his cotton, can have no influence upon the contract. *Ib.* 588

WAREHOUSE AND WAREHOUSEMEN—CONTINUED.

6. If, after a contract to store the defendant's cotton in a fire-proof warehouse, the latter dispensed with the completion of the warehouse, and consented that it need not be made fire-proof, such consent, if given, cannot be withdrawn after a loss has actually occurred, though there was no additional consideration for such consent. *Ib.* 588

WARRANTY.

1. When power is given to an agent to sell a slave, an authority is implied to make to the purchaser a warranty of title and soundness. *Cocke v. Campbell & Smith*, 286
2. An agent authorized by parol to sell a slave, cannot execute a warranty of soundness under seal, so as to bind his principal upon the warranty as his deed; but such a warranty, though under seal, is evidence, as an admission of the agent, at the time of the sale, of the terms of the contract. *Ib.* 286

WILLS AND TESTAMENTS, AND PROBATE OF.

1. In a contest about the validity of a will, the declarations of an executor having no interest under the will, cannot be given in evidence. *Roberts v. Trawick*, 68
2. When a will is propounded to the orphans' court for probate, and is there contested, the admissions, or declarations, by one of several legatees of the unsoundness of the testator's mind, or that fraud or undue influence was practised upon, or exercised over him, cannot be received to invalidate the will, to the prejudice of the other legatees. *Ib.* 68
3. If at the time of making a will, a testator is of sound mind, proof that twelve years before he had made a will, making a different disposition of his property, is irrelevant. *Ib.* 68
4. The declarations of the testator, made before, and at the time of the execution of the will, or so shortly thereafter as to form a part of the *res gestae*, and necessarily connected with it, may be received, to prove fraud or undue influence in its execution. *Ib.* 68
5. Upon a question of sanity, opinions of the capacity of the testator can only be given when preceded by the facts, or circumstances, upon which they are based; and can only be given by those whose long intimacy, and familiar and frequent intercourse with the deceased, qualifies them peculiarly to detect any mental alienation. *Ib.* 68
6. Testimony conducing to prove the unnatural character of the will, is admissible—as, that it deprived the most unfortunate of the testator's children of any participation in his bounty—or, that the testator was old, was in feeble health, of weak mind, or was prejudiced by his wife against his children. *Ib.* 68

See Slaves, 1.

See Trust, 4.

See Usury, 1.

WITNESS.

1. Where a witness will receive a greater share of the estate by defeating the will, than he would take under it, he is incompetent from interest to testify against its validity. *Roberts v. Trawick*, 68
2. An assignee of a judgment, which is afterwards reversed, and remanded by the supreme court for further proceedings, is an incompetent witness for the plaintiff, upon the ground of interest. A witness may be rejected for interest at any stage of the cause, when his interest is discovered. *Stewart v. Conner*, 94
3. The party with whom the adultery is charged to have been committed, is a competent witness for the other party. The degree of credit to be given to the testimony, is a question for the jury. *The State v. Crowley*, 172
4. When the plaintiff is offered as a witness under the statute, he cannot be confined to the statement merely, that the account, or each item of it, is just; but may prove all the facts and circumstances connected with it. When the defendant is offered as a witness, he is confined to a denial of the whole, or a portion of the statement of the plaintiff. *Yarborough v. Hood*, 176
5. P, as sheriff, sold certain land, and after the sale, by a parol, or verbal contract, acquired an interest in it, which interest he afterwards by parol, sold to one A for a sum of money, and a house and lot, which was conveyed to him—Held, that he was an incompetent witness for the plaintiff, the purchaser of the land, to prove the levy of the *fi. fa.* *McCollum v. Hubbert and Caple*, 282
6. B, holding a note on L, transferred it to R, by a special contract, providing for its payment, which R afterwards assigned to I, who brought suit against B, on the note, and transfer. B introduced a witness, who proved that in a certain contingency, certain claims which he held on R, were to be received and allowed, as payment or set off. Held, that R was a competent witness for I, to prove that no such agreement was made, as he was no party to the record, and his interest was equally balanced between B and I. Further, that being competent, he was not rendered incompetent by a release, and transfer executed by I. *Isbell v. Brown*, 383
7. One or more of several wrong doers, against whom nothing is proved, may be acquitted, and examined as a witness for his co-defendants; but where the least evidence is given against one of several wrong doers, who is sued jointly, he cannot be discharged on the trial, for the purpose of being examined as a witness. *Harris v. Mauldin, et als.* 674
8. One to whom a stakeholder pays over money, as the supposed winner in a horse race, after notice by the other party not to do so, is a competent witness for the stakeholder, when sued by the supposed loser, for improperly paying it over. *Ivey v. Phifer*, 821
 See Evidence, 46, 47, 48.
 See Husband and Wife, 6.
 See Usury, 2, 4.

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